Supreme Court, U.S.
FILED
JAN 30 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-432, 78-435 and 78-436

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

BRIAN F. WEBER, ET AL.

KAISER ALUMINUM & CHEMICAL CORPORATION,
PETITIONER

v.

BRIAN F. WEBER, ET AL.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

WILLIAM C. BRYSON
Assistant to the Solicitor General

BRIAN K. LANDSBERG
ROBERT J. REINSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530

ISSIE L. JENKINS
Acting General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

CARIN ANN CLAUSS
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutory provisions involved	3
Statement	4
Summary of argument	16
Argument:	
The Gramercy training programs are a permissible form of voluntary affirmative action under Title VII	20
A. Title VII permits, and often requires, employers to take race-conscious action	22
B. Devising remedies for discrimination may require consideration of race	26
1. The legislative history of the 1964 Act	28
2. The legislative history of the 1972 amendments to Title VII	31
C. Title VII permits private parties to take affirmative action to remedy apparent employment discrimination similar to the relief that a court could order to remedy proven discrimination	35

Argument—Continued Page

D. Kaiser could reasonably believe it would be found liable for discriminating against blacks at the Gramercy plant 42

E. The Gramercy training programs were appropriate remedies for the apparent Title VII violations in hiring for the craft positions.. 48

F. Title VII authorizes employers to take affirmative action in response to Executive Order 11246 54

1. The Executive Order program requires government contractors to take affirmative action, without need for proof of prior discrimination by each contractor 56

2. The Executive Order program is consistent with Title VII 63

3. The Gramercy training programs were consistent with the Executive Order program 70

Conclusion 73

CITATIONS

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 .....24, 26, 36, 41

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 35

Cases—Continued Page

Asbestos Workers, Local 53 v. *Volger*, 407 F.2d 1047 .....31, 32, 59

Boston Chapter, N.A.A.C.P., Inc. v. *Beecher*, 504 F.2d 1017, cert. denied, 421 U.S. 910 26

Brown v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, cert. denied, 409 U.S. 982 58-59

Carter v. *Gallagher*, 452 F.2d 315, cert. denied, 406 U.S. 950 .....27-28, 30, 32, 51

Castaneda v. *Partida*, 430 U.S. 482 43

Contractors Ass'n of Eastern Pennsylvania v. *Secretary of Labor*, 442 F.2d 163 .....60, 67, 70

Cox v. *Allied Chemical Corp. Local 216*, 382 F. Supp. 309 59

Crockett v. *Green*, 534 F.2d 715 27

Dothard v. *Rawlinson*, 433 U.S. 321 43

Equal Employment Opportunity Commission v. *American Telephone & Telegraph Co.*, 556 F.2d 167, cert. denied, Nos. 77-241, 77-242, and 77-243 (July 3, 1978) 26, 53-54

Ford Motor Co. v. *Huffman*, 345 U.S. 330 51

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 .....24, 26, 37, 51

Furnco Construction Co. v. *Waters*, No. 77-369 (June 29, 1978) 36, 38

General Electric Co. v. *Gilbert*, 429 U.S. 125 42

Griggs v. *Duke Power Co.*, 401 U.S. 424.. 16, 24, 41, 44

Hazelwood School District v. *United States*, 433 U.S. 299 43

Cases—Continued — Page

Hicks v. *Crown Zellerbach Corp.*, 319 F. Supp. 314 59
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324.....24, 26, 30, 37, 44, 46, 53
Joyce v. *McCrane*, 320 F. Supp. 1284..... 60
McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 ..... 21, 41
Morgan v. *Kerrigan*, 509 F.2d 599 26
Morrow v. *Crisler*, 491 F.2d 1053, cert. denied, 419 U.S. 895 ..... 26, 28
N.A.A.C.P. v. *Allen*, 493 F.2d 614 26
Nashville Gas Co. v. *Satty*, 434 U.S. 136.. 41, 42
Papermakers, Local 189 v. *United States*, 416 F.2d 980, cert. denied, 397 U.S. 919 59
Parson v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 ..... 47, 48
Patterson v. *Newspaper Deliverers' Union*, 514 F.2d 767 26
Pettway v. *American Cast Iron Pipe Co.*, 494 F.2d 211 58
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177 28
Regents of the University of California v. *Bakke*, No. 76-811 (June 28, 1978).....*passim*
Rios Enterprise Ass'n v. *Steamfitters, Local 638*, 501 F.2d 622 ..... 26, 51
Southern Illinois Builders Ass'n v. *Ogilvie*, 327 F. Supp. 1154, affirmed, 471 F.2d 680 60
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 31
United Jewish Organizations of Williamsburgh, Inc. v. *Carey*, 430 U.S. 144..... 25

Cases—Continued — Page

United States v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, cert. denied, 425 U.S. 944 .....8, 35, 40, 53
United States v. *Carpenters Local 169*, 457 F.2d 210, cert. denied, 409 U.S. 851 32
United States v. *City of Chicago*, 549 F.2d 415, cert. denied, 434 U.S. 875 26-27
United States v. *City of Jackson*, 519 F. 2d 1147 40
United States v. *Electrical Workers Local 38*, 428 F.2d 144, cert. denied, 400 U.S. 943 ..... 32, 59
United States v. *Electrical Workers, Local 212*, 472 F.2d 634 26
United States v. *Ironworkers, Local 86*, 443 F.2d 544, affirming 315 F. Supp. 1202, cert. denied, 404 U.S. 984.....27, 30-31, 32, 59
United States v. *Masonry Contractors Ass'n*, 497 F.2d 871 ..... 26, 58
United States v. *N. L. Industries, Inc.*, 479 F.2d 354 ..... 27, 36
United States v. *Operating Engineers, Local 520*, 476 F.2d 1201 58
United States v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 59
Washington v. *Davis*, 426 U.S. 229 38
Watkins v. *Scott Paper Co.*, 530 F.2d 1159, cert. denied, 429 U.S. 861 ..... 44, 58
Weiner v. *Cuyahoga Community College Dist.*, 238 N.E.2d 839, affirmed, 19 Ohio 2d 35, 249 N.E.2d 907, cert. denied, 396 U.S. 1004 60

Statutes and regulations: Page

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 *et seq.*:

Section 401, 42 U.S.C. 2000c(b) 31
Section 407(b), 42 U.S.C. 2000c-6 31
Section 701, 42 U.S.C. 2000e at 1232 3
Section 703(a), 42 U.S.C. 2000e-2(a) 10, 13, 17, 21
Section 703(d), 42 U.S.C. 2000e-2(d) 10, 13, 21
Section 703(h), 42 U.S.C. 2000e-2(h) 23
Section 703(j), 42 U.S.C. 2000e-2(j) 30, 31
Section 706(b), 42 U.S.C. 2000e-5(b) 35
Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1) 13, 35
Section 706(g), 42 U.S.C. 2000e-5(g) 3, 27, 28, 31
Section 709(d), 42 U.S.C. 2000e-8(d) 63
Section 712, 42 U.S.C. 2000e-11 23
Section 713(b)(1), 42 U.S.C. 2000e-12(b)(1) 3, 40
Section 715, 42 U.S.C. 2000e-14 69
Section 718, 42 U.S.C. 2000e-17 68

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 31
National Labor Relations Act, Section 10(c), 29 U.S.C. 160(c) 28
Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 *et seq.*:

Section 2, 42 U.S.C. 1973 25
Section 4, 42 U.S.C. 1973b 25
Section 5, 42 U.S.C. 1973c 25

Statutes and regulations—Continued Page

41 C.F.R. Part 60-1.24(c)(2) 61
41 C.F.R. Part 60-2 61
41 C.F.R. Part 60-2.11 ..... 61, 62
41 C.F.R. 2.11(a) 72
41 C.F.R. 60-2.11(b)(1)(iii) 72
41 C.F.R. 60-2.11(b)(1)(viii) 63, 72
41 C.F.R. 60-2.12-60-2.24 62
41 C.F.R. 60-2.20(a)(1) 72
41 C.F.R. 60-2.12(d) 72
41 C.F.R. 60-2.12(g) 72
41 C.F.R. 60-2.24 62
41 C.F.R. Part 60-4 61
41 C.F.R. Part 60-5 60
41 C.F.R. Part 60-6 60
41 C.F.R. Part 60-8 60
41 C.F.R. Part 60-10 60
41 C.F.R. Part 60-11 60

Miscellaneous:

Comments, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. of Chi. L. Rev. 723 (1972) 31, 64
Committee on Government Contracts, *Patterns for Progress* (Final Report) (1960) 57, 62
109 Cong. Rec. (1963):

p. 3248 64
p. 11178 64

110 Cong. Rec. (1964):

pp. 5877-5878 29
p. 6549 29
p. 6563 29

Miscellaneous—Continued — Page

p. 7214 29
p. 7215 64
p. 7243 29
p. 7774 29
p. 144465 29

117 Cong. Rec. (1971):

p. 31963 67
p. 31975 67
p. 32091 67
p. 32105 67
p. 32111 ..... 33, 68

118 Cong. Rec. (1972):

p. 1385 66
pp. 1387-1391 65
p. 1389 66
pp. 1395-1396 62
p. 1397 64
p. 1662 67
p. 1663 67
p. 1664 ..... 33, 67, 68
pp. 1664-1676 33
p. 1665 33
pp. 1665-1671 33
p. 1671 67
p. 1675 34
p. 1676 33
p. 3367 67
p. 4917 67
p. 4918 33
p. 7166 34
p. 7168 35

Miscellaneous—Continued — Page

Executive Order 8802, 3 C.F.R. 957 (1938-1943 compilation) 56
Executive Order 10210, 3 C.F.R. 390 (1949-1953 compilation) 56
Executive Order 10479, 3 C.F.R. 961 (1949-1953 compilation) 56
Executive Order 10925, 3 C.F.R. 448 (1959-1963 compilation) 56, 57, 63
Executive Order 11246, 30 Fed. Reg. 12319 (1965) 3, 4, 10, 11, 12, 19, 54, 57, 63, 68
Executive Order 11375, 32 Fed. Reg. 14303 (1967) 3, 4, 63
Executive Order 12086, 43 Fed. Reg. 4650 (1978) 4
36 Fed. Reg. 23152 (1971) 61
41 Fed. Reg. 38814 (1976) 41
43 Fed. Reg. 38290 (1978) 41
44 Fed. Reg. 4421 (1979) 40-41
44 Fed. Reg. 4426-4428 (1979) 41
W. Gould, *Black Workers in White Unions* (1977) 58, 59
H.R. 1746, 92d Cong., 2d Sess. (1972) 34, 35
H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) 32, 33, 34, 65, 69
H.R. Rep. No. 1370, 87st Cong., 2d Sess. (1962) 23
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 23, 63
F. Marshall, *The Negro Worker* (1967) 58
F. Marshall and V. Briggs, Jr., *The Negro and Apprenticeship* (1967) 58
Memorandum on Goals and Timetables, 1 Empl. Prac. Guide (CCH) ¶ 3775 (1973) 41

Miscellaneous—Continued	Page
R. Nathan, *Jobs and Civil Rights* (1969)	58
H. Northrup, *Organized Labor and the Negro* (1944)	58
Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, N.Y.U.L. Rev. 590 (1969)	58
42 Op. Att'y Gen. 405 (1969)	56
Order No. 4, 36 Fed. Reg. 23152 (1971)	61, 62
The Philadelphia Plan: Hearings on S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969)	60
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)	32, 33, 65
President's Committee on Government Contract Compliance, *Equal Economic Opportunity* (1953)	57
U.S. Bureau of the Census, *1970 Census of Population: Characteristics of the Population*, Vol. 1, Part 20, Louisiana	45
United States Commission on Civil Rights, *Employment* (1961)	57, 58
United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* (1976)	59
United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, To Eliminate Employment Discrimination*	61
Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Comm. L. Rev. 431 (1966)	30

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, ET AL.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER

v.

BRIAN F. WEBER, ET AL.

No. 78-436

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a)[1] is reported at 563 F.2d 216. The order of the court of appeals denying rehearing (Pet. App. 57a-58a) is reported at 571 F.2d 337. The opinion of the district court (Pet. App. 59a-79a) is reported at 415 F. Supp. 761.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on November 17, 1977. Petitions for rehearing were denied on April 17, 1978 (Pet. App. 57a-58a). On July 7, 1978, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including September 14, 1978. The petitions in Nos. 77-432, 77-435, and 77-436 were filed on September 14, 1978, and granted on December 11, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of an admission or proof of past discrimination, an employer and a union may adopt a training program based in part upon a racial criterion to remedy apparent discrimination in hiring for skilled craft jobs at one of the employer's plants.

---

[1] "Pet. App." refers to the appendix to the petition in No. 78-436.

STATUTORY PROVISIONS INVOLVED

Several pertinent provisions of Title VII of the Civil Rights Act of 1964 are set forth in the Appendix to the Petition for a Writ of Certiorari in No. 78-435 (Pet. App. 66a-68a).

In addition, Section 706(g) of Title VII, Pub. L. No. 88-352, 78 Stat. 261, as amended, 42 U.S.C. 2000e-5(g), provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate. * * * No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704(a).

Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), reprinted in 42 U.S.C. 2000e at 1232, is set forth in the Appendix to the Petition for a

Writ of Certiorari in No. 78-435 (Pet. App. 69a-83a).

STATEMENT

1. Kaiser Aluminum & Chemical Corporation operates a plant in Gramercy, Louisiana, located along the Mississippi River about halfway between New Orleans and Baton Rouge. The plant, which has been in operation since 1958, draws employees from the neighboring two parishes of St. James and St. John the Baptist (Pet. App. 62a; A. 60, 78).

In 1969, although the local population was approximately 46 percent black and the local labor force about 39 percent black, only about 10 percent of the employees at the Gramercy plant were black (Pet. App. 35a; A. 60, 78-79). In that year, at the urging of the Office of Federal Contract Compliance,[2] Kaiser began filling approximately half the vacancies in the unskilled, non-craft jobs at the plant with minority applicants (A. 78-79, 81-82, 87). As a result of this policy, the percentage of minority employees at the plant increased by about one percent per year between 1969 and 1974, so that by December 1973, approximately 15 percent of the plant's employees were black (A. 59-60, 87).

[2] The Office of Federal Contract Compliance, subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an office within the Department of Labor. It is responsible for ensuring compliance by government contractors with the equal employment opportunity responsibilities established by Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), and by Executive Order 12086, 43 Fed. Reg. 46501 (1978).

In the skilled craft jobs at the plant, the percentage of minority employees was even lower than in the plant as a whole. By the end of 1973, there were only five black employees among the 273 skilled craft workers at the plant—less than two percent (A. 62, 167). Kaiser attributed the disparity between the percentage of blacks in the local labor force and the percentage of black employees holding skilled craft jobs at the Gramercy plant to the lack of training opportunities for blacks, caused in large part by discrimination in the building trades and related industries (A. 63, 90, 93, 103-104).

Prior to 1974, Kaiser had filled almost all the craft positions at the Gramercy plant by hiring craftsmen from outside the plant who met the company's experience and qualification requirements (A. 71, 77, 125). These requirements initially included at least five years of previous industrial experience in the craft (A. 43, 70). Because blacks had not been permitted to participate in substantial numbers in union and employer-operated craft training and apprenticeship programs, there were not many black craftsmen available who could meet Kaiser's five-year experience requirement for the craft jobs (A. 43). Although that requirement was subsequently reduced to three years of prior experience (A. 43, 70), and although the company made efforts to recruit qualified black craftsmen who met that experience requirement (A. 62-63), by the end of 1973 only three of the

craft jobs in the plant were held by blacks who had met the company's experience and qualification requirements (Pet. App. 17a & n.13).

Between 1964 and 1971, Kaiser offered two on-the-job training programs to train unskilled plant employees for the plant's skilled jobs. Both programs, however, were quite limited in the numbers of trainees taken, and both required at least some previous experience in the craft for which the training was offered. The first program, which began in 1964, offered training in the "Carpenter-Painter" craft category. Employees with a minimum of one year's experience in that craft were permitted to bid for the program. Openings in the program were filled on the basis of seniority. A total of 11 employees entered this craft line during the period that the training program was in effect. Only two of the 11 were black (A. 126). The second program, which began in 1968, offered employees on-the-job training in the craft category of "General Repairman." Employees with three years' prior experience in the craft were eligible for this program, for which the qualified applicants were selected in order of their seniority at the plant. Seventeen trainees entered this program during the period it was in effect. All were white (A. 126).

In late 1973, in anticipation of the upcoming collective bargaining negotiations with the United Steelworkers of America, the certified representative of most of the production and maintenance employees at Kaiser's plants, Kaiser officials met with Steelworkers

representatives to discuss the problem of the low number of minority employees in craft positions, not only at the Gramercy plant but in Kaiser's plants throughout the country. As one Kaiser official characterized the discussions, "[t]here was certainly a concert of opinion that there was a problem, and one that had to be solved, so that [there] were preparatory discussions, prior to the negotiations, that there had to be some solution arrived at to change the situation" (A. 92). A joint company-union committee was established to "resolve possible inconsistencies" between Kaiser's hiring practices and "Government and judicial decisions" (A. 139).

In early 1974, Kaiser signed a nationwide collective bargaining agreement with the Steelworkers. The company and union issued a joint "memorandum of understanding" at that time, in which they stated that after reviewing the minority representation in the company's skilled craft jobs, they had determined that "notwithstanding the efforts made by the Company and the Union and/or the gains made via the Company's various Affirmative Action Plans per E.O. 11246," the participation of minority employees in skilled craft positions at Gramercy and other Kaiser plants "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions" (A. 144-145). To achieve this goal, the 1974 collective bargaining agreement provided that at least half the employees placed in training programs for craft jobs in the designated plants should be minority

group members or women unless not enough qualified minority or women applicants were available at the time. That selection ratio would be maintained at each plant, according to the agreement, until the minority representation in the craft jobs was equivalent to the minority representation in the local labor market (Pet. App. 62a-64a).[3] Similar minority-oriented training programs were established throughout the aluminum industry as well as in the can industry (A. 61, 94). These programs mirrored a provision in the 1974 nationwide steel industry consent decree, to which the Steelworkers union was a party. See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 880 n.87 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

2. Respondent Weber is a white employee at Kaiser's Gramercy plant. In April 1974 the Gramercy plant announced that it was offering a total of nine positions in three on-the-job training programs for skilled craft jobs, in accordance with the terms of the 1974 collective bargaining agreement.[4] Bidding for the positions was open to all employees in the plant, with eligibility to be determined on the basis of plant seniority. To implement the 50 percent

[3] A goal of five percent female representation was set for each craft family in each of the plants included within the program (A. 145).

[4] Five of the positions were for a training program for the "General Repairman" craft class, two were for the "Electrician" craft class, and two were for the "Instrument Repairman" craft class (A. 166).

minority participation goal, however, black and white applicants were selected on the basis of their relative seniority within their racial group (Pet. App. 2a). Thus, the five most senior black applicants and the four most senior white applicants were selected for the nine positions in the April 1974 programs.[5] Weber applied for all three programs offered in April but was not selected (A. 46-47). Two of the black applicants who were selected had less plant seniority than Weber (A. 32-33, 156-161).

For the year 1974, the company offered a total of 13 training positions for skilled craft jobs.[6] Selections were made on an alternating basis between the most senior black and white employees bidding, so that by the end of the year the company had selected seven black employees and six white employees for the 13 positions. In each instance, successful black bidders were junior in plant seniority to some unsuccessful white bidders (Pet. App. 2a, 63a). A Kaiser official

[5] There were two women employed in unskilled jobs at Gramercy at that time. Although under the memorandum of understanding women were entitled to compete for the positions reserved for minority and women employees, neither of the women employees bid for the 1974 programs.

[6] In addition to the April programs, the company offered three more training programs in 1974 with a total of four positions available. Two white and two black employees were selected for the programs, which were for "Air Conditioning Repairman" (one position), "Carpenter-Painter" (two positions), and "Insulator" (one position). Weber sought to bid for the insulator trainee position, but he was not selected because that job was reserved for the most senior qualified black employee (A. 46).

stated that if selections had been made strictly by seniority, "there would be very few blacks that would get into any of the crafts for quite a while" (A. 72). During the same year, the company hired 22 craftsmen from outside the plant. All but one of those employees were white (A. 65).

3. Weber filed a complaint in the District Court for the Eastern District of Louisiana, alleging that the use of a racial criterion to fill the craft training vacancies violated Sections 703(a) and 703(d) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-2(d). The district court certified a plaintiff class consisting of all non-minority employees at Gramercy who had applied for or were eligible to apply for the on-the-job training programs (Pet. App. 61a; A. 34).

The two Kaiser officials who testified at trial[7] denied that Kaiser had discriminated in hiring, but they stated that the company was aware of its vulnerability to private or governmental lawsuits under Title VII and to coercive sanctions under Executive Order 11246 (A. 62, 77, 92-93). Kaiser and other aluminum companies had been defendants in Title VII litigation relating to plants similar to the Gramercy plant,[8] and Kaiser and the Steelwork-

[7] Four witnesses testified at the one-day trial: Weber, the two Kaiser officials, and another white employee who had not been selected for any of the training programs. In addition, a short factual stipulation and accompanying exhibits were introduced into evidence. The union did not call any witnesses.

[8] Two of these lawsuits alleged discrimination at Kaiser's other plants in Louisiana (see pages 46-47, *infra*).

ers were aware of the government's industry-wide lawsuit against the steel industry, which had led to a consent decree costing the steel companies millions of dollars in back pay awards (A. 83, 97). See *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*.

Kaiser decided to take voluntary affirmative action, according to one of the company witnesses, because "we looked at our problem, which was that we had no blacks in the crafts, to speak of * * * and we realized that if we did not do something on our own, then the Government was going to do it for us * * * [and] whatever their remedy is * * * it's one heck of a lot worse than something we can work out for ourselves" (A. 83). Another company witness testified that Kaiser officials had decided "that we should do those things that are necessary, without having to have it forced down our throat or require us to go into court to comply with the laws of the land" (A. 97). The witness added that during reviews of Kaiser's compliance with the affirmative action obligations of Executive Order 11246, the OFCCP, through two of its compliance agencies, had put pressure on Kaiser to increase the number of minority employees in craft jobs. He stated, "I don't think that I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly, the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing" (A. 93). The Steelworkers favored voluntary

affirmative action, according to the company witnesses, and the union particularly favored the on-the-job training programs because they offered incumbent employees of both races a new means of access to the skilled craft jobs (A. 64, 73, 85, 97).

The district court held that assignment by race to the on-the-job training programs at the Gramercy plant violated Title VII. In the court's view, "quota systems" could be imposed as a form of relief only by the courts and then "only in these limited cases where necessary to cure the ill effects of past discrimination" (Pet. App. 73a). The court found that Kaiser's decision to bargain for on-the-job training programs was "prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC) * * *" (Pet. App. 65a). The primary motivations for instituting the programs, the court found, were "satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees * * *" (*ibid.*). Yet the court concluded that because the black employees selected for on-the-job training programs at the Gramercy plant "had never themselves been the subject of any unlawful discrimination during hiring," the kind of "affirmative action quota system" exemplified by the race-conscious training programs would have been an inappropriate remedy for a court to order. Thus,

Kaiser's practice of selecting trainees by race was unlawful, the court held, even if Title VII permits an employer to institute a race-conscious program in those circumstances in which a court could properly order a race-conscious remedy (Pet. App. 77a). The court granted an injunction barring Kaiser and the Steelworkers "from denying plantiffs, Brian F. Weber and all other members of the class access to on-the-job training programs on the basis of race" (Pet. App. 81a).

4. The court of appeals affirmed, one judge dissenting.[9] It held that using race as a criterion for selecting trainees in the Gramercy training programs violated Sections 703(a) and 703(d) of Title VII, 42 U.S.C. 2000e-2(a) and 2000e-2(d). The court of appeals rejected the district court's conclusion that only courts could institute race-conscious programs to remedy prior discrimination (Pet. App. 15a-16a), but it agreed with the district court that on the facts of this case, the use of a racial criterion in the selection of trainees violated Title VII (Pet. App. 20a). The court noted that the district court found that Kaiser "has not been guilty of any discriminatory hiring or promotion at its Gramercy plant" (Pet. App. 17a). In the absence of prior discrimination, the court held, "a racial quota loses its character as

---

[9] The United States and the Equal Employment Opportunity Commission did not participate in the district court, but filed a brief as amici curiae in the court of appeals. The United States and the Equal Employment Opportunity Commission then intervened in the case for purposes of filing a petition for rehearing and for any further proceedings in the case. See 42 U.S.C. 2000e-5(f)(1).

an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII" (*id.* at 18a; emphasis in original). Title VII, the court stated, "outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications, but it does not outlaw preferences favoring victims of discrimination" (Pet. App. 18a-19a). Yet because, in the court's view, a racial preference is permissible only if it is designed "to restore employees to their rightful places within a particular employment scheme" (*id.* at 20a), the court held that the preferential training programs could not be used in this case, where there was no proof that Kaiser had discriminated against the particular individuals benefitted by the racial preference (*id.* at 31a).

The court of appeals also rejected the contention that the Executive Order supports the legality of the Gramercy training programs. The Executive Order, the court stated, cannot sanction affirmative action programs that would otherwise be contrary to Title VII (Pet. App. 24a). If the Executive Order purports to require a racial quota for admission to on-the-job training by Kaiser, the Executive Order must give way to the congressional prohibition contained in Title VII, the court held, at least in the absence of any finding of prior discrimination in hiring or promotion by Kaiser (*id.* at 25a).

In dissent, Judge Wisdom offered three justifications for Kaiser's program. First, he pointed out that to condition affirmative action on proof of past

discrimination would discourage voluntary compliance with the equal employment opportunity goals of Title VII (Pet. App. 31a-32a). Employers and unions, he stated, should be permitted to institute reasonable voluntary remedies for arguable violations of Title VII. Judge Wisdom pointed to the low level of minority participation in the general work force at the Gramercy plant and particularly in the skilled craft positions, as well as the exclusionary effect of the company's practice of requiring five years of prior experience and training as a prerequisite for the craft positions (*id.* at 35a-37a). These factors, he concluded, were sufficient to put Kaiser and the Steelworkers at risk of being found to have violated Title VII; they should therefore be entitled to devise a reasonable remedy, such as the Gramercy training programs, for these arguable violations of the Act (*id.* at 37a-42a). Second, Judge Wisdom stated that employers and unions should be permitted voluntarily to take steps to remedy the severe and recent discrimination against blacks in employment in the skilled crafts generally (*id.* at 43a-47a). Third, he concluded that the Gramercy training programs might be justified as part of Kaiser's effort to comply with the affirmative action requirements of Executive Order 11246 (*id.* at 48a-53a). If it were necessary to reach this question, Judge Wisdom stated, a remand would be necessary to determine whether the training programs are consistent with the Executive Order and, if so, whether the federal

authorization of such action raises any constitutional questions.[10]

SUMMARY OF ARGUMENT

Title VII was enacted to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971). While the statute protects both whites and non-whites from employment discrimination, it does not prohibit employers from taking account of race in making employment decisions. Because Title VII outlaws employment practices that have a discriminatory effect as well as those that are the product of discriminatory intent, the statute requires that employers be conscious of the racial impact of their employment practices. And even where race-conscious action is not required by the statute, it is permitted if it serves to remedy the effects of prior discriminatory conduct.

This much is undisputed. Yet while the court of appeals acknowledged that an employer can lawfully take race-conscious action to remedy its prior discrimination, the court held that such action is permissible only in very limited circumstances: to justify the race-conscious action, according to the court of appeals, the employer must prove that it engaged

[10] Judge Wisdom did not disagree with the majority that any conflict between the Executive Order and Title VII should be resolved in favor of Title VII. In this case, however, he found no conflict between the two (Pet. App. 48a).

in discrimination, and its remedial action must be limited to benefiting the particular victims of its discriminatory conduct. In our view, this standard is too narrow. Although an employee makes a prima facie showing of a violation of Section 703(a) of the Act by proving that the employer took action that disadvantaged him and was based on a racial criterion, that prima facie showing is rebutted if the employer can show that it had a reasonable basis for believing that race-conscious action was necessary to bring it into compliance with Title VII or to remedy past violations of the Act.

Kaiser had ample cause for concern that it might be held liable for discriminating against blacks in the craft positions at its Gramercy plant. The representation of blacks among the skilled craft workers at the plant was far below their representation in the local labor force, and it was well below their representation among craft workers in the local area. Moreover, Kaiser had long required substantial previous industrial craft experience as a prerequisite for entry into craft jobs at the Gramercy plant. That requirement, as Kaiser officials recognized, had an adverse impact on blacks. Unless it were found to meet the stringent test for job-relatedness under Title VII, that requirement, in conjunction with the huge disparity between the proportion of blacks in the skilled craft positions at the Gramercy plant and in the general labor force, would render Kaiser highly vulnerable to a successful Title VII suit by minority employees or applicants for employment.

In response to concerns about the underrepresentation of blacks in the craft positions at Gramercy, Kaiser and the Steelworkers agreed to take steps to remedy the situation. The action they decided to take—instituting craft training programs for unskilled employees—was an appropriate response to the problem. The programs benefited all incumbent employees, both white and black, by offering new opportunities for entry into the craft categories. At the same time, by providing for selection of minorities into the training program on a one-for-one basis, the program ensured that minorities would gain access to craft jobs and that the training programs would not perpetuate the effects of previous hiring practices at the Gramercy plant. Indeed, a training program limited to incumbent employees would otherwise have a built-in racial bias, due to the substantially smaller proportion of minority employees—and especially senior employees—in the plant compared to that in the local labor force.

The remedy selected by Kaiser and the Steelworkers thus was an appropriate one under the circumtances. A court could have imposed such a remedy if, after litigation, it had found that Kaiser had discriminated against blacks in selecting employees for craft positions. The legislative history of Title VII establishes that numerical race-conscious measures, such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And, even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation. Moreover, as the legislative history of Title VII further shows, the kind of measures taken here were understood to be consistent with the affirmative action requirements of Executive Order 11246, and not to be prohibited by Title VII.

In this case, the remedial measures were instituted voluntarily, without litigation and without formal administrative sanctions under the Executive Order. Yet the absence of formal proceedings does not render unlawful what could lawfully have been imposed either administratively or by a court. Voluntary compliance is a central theme of Title VII, and once it is determined that particular race-conscious action is appropriately remedial, that action does not violate the non-discrimination principle of Title VII, whether it is contained in a collective bargaining agreement or in the order of a court. Nor would the purposes of the Act be served by requiring an employer to admit and prove its own violations of the law in order to justify remedial action of this nature. Such a requirement would plainly discourage voluntary compliance. Instead, it would leave an employer in the awkward posture of having to await litigation charging discrimination against minorities while being prohibited from taking steps that would help remedy the effects of its apparent past acts of discrimination. Title VII does not compel such a result. The voluntary action taken by Kaiser and the Steelworkers in this case is consistent with, and not prohibited by, Title VII.

ARGUMENT

THE GRAMERCY TRAINING PROGRAMS ARE A PERMISSIBLE FORM OF VOLUNTARY AFFIRMATIVE ACTION UNDER TITLE VII

In 1973 Kaiser and the Steelworkers found themselves faced with a difficult dilemma. They recognized that minorities were dramatically underrepresented in the skilled craft jobs at the Gramercy plant and elsewhere. They could have elected to take no action, but they realized that inaction could well result in private suits and possible sanctions by the OFCCP. Instead, they chose what appeared to be the preferable course: to take measured steps to increase minority representation in the plant's craft categories, even though that course would necessarily involve the company in race-conscious employment practices.

Kaiser and the Steelworkers sought to devise a scheme that would help cure the problem of the underrepresentation of minorities in the skilled craft jobs and at the same time benefit incumbent employees—white as well as black. Accordingly, they determined to offer new on-the-job training programs for skilled craft positions that would be open only to employees within the plant. But because of past hiring practices, the plant population was disproportionately white in comparison with the general work force in the area—and especially so among those with greater employment seniority. Therefore, in order to ensure that minority participation in the training programs would be significant, they had to use race

as one criterion for selection to the programs. Otherwise, the use of a training program limited to in-plant applicants would itself arguably have been an instrument of racial discrimination. It was the decision to use race as a selection criterion that led to the suit by respondent Weber and a class of white employees who sought admission to the training programs offered at the Gramercy plant.

By showing that a racial classification was used for selection, respondent made a prima facie showing of a violation of Sections 703(a) and 703(d) of Title VII, 42 U.S.C. 2000e-2(a) and 2000e-2(d), under this Court's decision in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976). Our submission is that the complainants' prima facie case was rebutted, because the use that is made of race as a criterion for selecting participants in the Gramercy training programs does not constitute discrimination against Kaiser's white employees and does not improperly limit, segregate, or classify them, in violation of the statutory standards. Instead, a race-conscious selection device is properly used here for remedial purposes—as a means of voluntarily eliminating the effects of prior exclusionary practices.

Upon a finding of employment discrimination, a court may order race-conscious relief; indeed, such relief is often necessary to overcome the effects of the unlawful discrimination. See *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), slip op. 32 (opinion of Powell, J.); *id* at 18-19 n.17, 30-31 & n.28 (opinion of Brennan, White,

Marshall, and Blackmun, JJ.). Yet a race-conscious remedy is not lawful simply because a court has imposed it: it is lawful because it is remedial and restores employment conditions, to the greatest extent possible, to what would have existed absent discrimination. As we shall show, Title VII does not prohibit employers or unions from voluntarily taking remedial measures that courts could order upon a finding of discrimination. Thus, where a particular program is appropriately tailored to remedy apparent employment discrimination and a court could order the program as a remedy for proven employment discrimination, an employer is free to adopt the program voluntarily. This is so even if the program uses a racial criterion which, but for its justification as a remedy, would violate the Act. In this way, the broad prohibitions of Title VII are properly reconciled with its remedial purposes and its emphasis on encouraging voluntary compliance.

A. Title VII Permits, and Often Requires Employers to Take Race-Conscious Action

Not all race-conscious action taken by an employer constitutes racial discrimination or serves impermissibly to "limit, segregate, or classify" employees by race. In some respects, Title VII actually requires the employer to take account of race or even to treat its employees differently on the basis of their race. The required race consciousness is a product of the statute's reach, which includes not only intentional discrimination, but facially neutral conduct that has a discriminatory effect.

Title VII was founded upon legislative determinations that racial minorities were subjected to pervasive and systematic employment discrimination. H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963); H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962). See *Regents of the University of California* v. *Bakke*, *supra*, slip op. 39-40 n.44 (opinion of Powell, J.). Congress had before it "overwhelming" evidence of discrimination in employment, H.R. Rep. No. 914, *supra*, part 2, at 26. Some progress toward eliminating discrimination had been made through state fair employment legislation and through enforcement of federal Executive Orders in the contract compliance area, *id.* at 28-29. Congressional study revealed, however, that "the incidence and depth of inequality remain widespread [and] [d]iscrimination continues to exist in all parts of the country" (*id.* at 29).

Faced with such entrenched patterns of discrimination, Congress legislated broadly. It decreed that no person, black or white, would be discriminated against in employment because of his race. But it was clear that indifference to racial considerations could perpetuate prior discriminatory patterns and their effects. Therefore, Congress held employers and unions accountable not only for intentional discrimination, but also for employment practices having a discriminatory effect.[11] As this Court observed in

---

[11] Where Congress, under Title VII, intended not to prohibit practices having disproportionate racial effects, it provided specific statutory exceptions. See, *e.g.*, Section 703(h), 42 U.S.C. 2000e-2(h) (bona fide seniority system); Section 712, 42 U.S.C. 2000e-11 (veterans' benefits).

Griggs v. *Duke Power Co., supra,* 401 U.S. at 429-430, Congress's objective in enacting Title VII was "to achieve equality of employment opportunity and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, under the Act, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

Because Title VII prohibits employment practices that have a racially disproportionate effect, except where they are justified on grounds of business necessity,[12] the statute necessarily requires employers to be conscious of the racial impact of their employment practices. *Griggs* held that Title VII prohibits the use of employment tests that have a substantial disparate impact on minority applicants or employees, unless the employer proves that the tests are job related. And *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), held that in validating an employment test as job related, employers could be required to counteract its racially disparate effects by resorting to racial criteria. In some circumstances, the Court held, they could be required to undertake "differential validation" of their employment tests; *i.e.,* setting

[12] See *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 348-350 (1977); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763 (1976); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431.

one passing score for blacks and another for whites, so that the test would predict success on the job equally well for both racial groups. 422 U.S. at 435. Moreover, even if a selection device is properly validated, it cannot be used if there is an alternative practice available that equally serves business needs but has a lesser exclusionary effect on minorities. *Id.* at 425.

Since compliance with Title VII often requires consideration of race, it cannot be said that the use of racial classifications necessarily violates the Act. By the very process of determining the racial effects of an employment practice, or of differentially validating that practice, or of replacing that practice with another less detrimental to minorities, an employer must consider the race of his employees and applicants.[13] For this reason, "it is clear that employers, to ensure equal employment opportunity, may have to adopt race-conscious hiring practices." *Regents of*

[13] In this respect, Title VII is similar to the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. Like Title VII, the Voting Rights Act protects all individuals from discrimination "on account of race or color." 42 U.S.C. 1973. In order to combat massive discrimination against minority voters, Congress prohibited governmental entities covered by Section 4 of the Act, 42 U.S.C. 1973b, from changing their voting procedures in a manner that would have the effect of discriminating against minorities. 42 U.S.C. 1973c. Compliance with the Act thus "often necessitate[s] the use of racial considerations in drawing district lines," *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144, 159 (1977) (plurality opinion); and "specific numerical quotas in establishing a certain number of black majority districts" may be necessary and are lawful. *Id.* at 162.

the University of California v. *Bakke*, *supra*, slip op. 40 n.37 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

B. Devising Remedies for Discrimination May Require Consideration of Race

Race-conscious measures may be necessary not only to comply prospectively with the Act, but also to remedy the effects of unlawful discrimination in the past. Thus, in *Franks* v. *Bowman Transportation Co.*, *supra*, this Court held that seniority credits could be awarded on a racial basis in class action cases, and in *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 357-362, the Court applied that principle to "pattern or practice" suits. In addition, appropriately tailored class-based numerical relief has been upheld in all eight circuits that have considered the matter, where such relief is necessary to rectify the effects of past exclusionary practices.[14] See *Regents of the University of Cali-*

[14] See, *e.g.*, *Morgan* v. *Kerrigan*, 509 F.2d 599 (1st Cir. 1975); *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Patterson* v. *Newspaper Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975); *Rios* v. *Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), cert. denied, Nos. 77-241, 77-242 and 77-243 (July 3, 1978); *N.A.A.C.P.* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); *United States* v. *Electrical Workers, Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States* v. *Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1974); *United States* v. *City of Chicago*,

fornia v. *Bakke*, *supra*, slip op. 32 (opinion of Powell, J.); *id.* at 30-31 & n.28 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The authority to grant race-conscious relief, including numerical relief, if necessary, is found in Section 706(g) of the Act. That Section provides that upon finding a violation of Title VII, a court may order "such affirmative action as may be appropriate," including awards of back pay, orders to reinstate or hire employees, and "any other equitable relief as the court deems appropriate." Numerical remedies, in appropriate cases, may be essential to overcome settled patterns of discrimination. For example, by insuring a degree of minority representation in a work force, a numerical remedy "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." *N.A.A.C.P.* v. *Allen*, 493 F.2d 614, 621 (5th Cir. 1974). Moreover, minority workers are often reluctant to apply for jobs with employers who have excluded members of their race, "absent some positive assurance that if qualified they will in fact be hired on a more than token basis." *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (en

549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977); *Crockett* v. *Green*, 534 F.2d 715 (7th Cir. 1976); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 377 (8th Cir. 1973); *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

banc), cert. denied, 406 U.S. 950 (1972). See also *Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974). Integration, like segregation, tends to perpetuate itself—by word-of-mouth recruitment, by breaking down the stereotypes of inferiority that caused the discrimination, and by creating countervailing forces of nondiscrimination, such as the duty of unions to represent their members fairly.

1. *The Legislative History of the 1964 Act.*

When it enacted Title VII, Congress gave little indication of the kind of remedies it contemplated that courts would order in Title VII suits. Section 706(g) was modeled on the remedial section of the National Labor Relations Act, Section 10(c), 29 U.S.C. 160(c). See *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 419. And that provision, as this Court has noted, was intentionally left open-ended:

> [I]n the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.

Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941). In *Phelps Dodge*, the Court made it clear that Section 10(c) was not intended to restrict the remedial powers of the Board

"within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Id.* at 188. Because the National Labor Relations Act, like Title VII, was not confined to the "correction of private injuries," *id.* at 193, the Court held that the remedies granted by the Board should be designed to serve the public purposes of the Act as well as the private purposes of restorative justice.

To be sure, there was considerable concern that the Act would be construed to require the use of quota systems to establish and maintain racial balance in employers' work forces. See, *e.g.*, 110 Cong. Rec. 5877-5878 (1964) (remarks of Sen. Byrd); *id.* at 7774, 7778 (remarks of Sen. Tower). The sponsors of the bill repeatedly assured its opponents that this was not the intent and would not be the effect of the statute. See *id.* at 6549 (remarks of Sen. Humphrey); *id.* at 6563 (remarks of Sen. Kuchel); *id.* at 7243 (remarks of Sen. Case). But these assurances did not suggest restrictions on remedies that could be ordered after a finding of discrimination. Instead, they made it clear that the statute would not impose a duty on employers to establish racially balanced work forces and that it would not require or even permit employers to establish racial quotas for employment in the absence of discrimination of the kind prohibited by the Act. See *id.* at 7214 (Interpretative Memorandum of Sens. Clark and Case) (court cannot order remedy in the absence of discrimination prohibited by Title VII); *id.* at 6549 (remarks of Sen. Humphrey); *id.* at 14465

(Bipartisan Newsletter No. 28) (neither a court nor the Commission can order quota or other remedies in the absence of discrimination of the kind prohibited by Title VII).

The nature of the concerns about the reach of the statute is made clear by two provisions incorporated into the final version of Title VII. On the eve of passage, Senators Humphrey and Dirksen introduced a substitute for the bill that had been under debate. See Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Comm. L. Rev. 431, 447-457 (1966). The substitute bill, which ultimately became Title VII, added amendments to allay the fears that the statute would require quota hiring and that it would restrict management prerogatives on a broad front. The amendment that became Section 703(j) of the Act stated that Title VII would not require employers to engage in preferential hiring merely to attain racial balance,[15] and the amendment that became the last sentence of Section 706(g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act. These provisions did not in any way restrict the scope of the remedies that could be ordered for the kinds of discrimination prohibited by the Act. Instead, the adaptation of remedies was left to the courts and agencies charged with enforcing the statute.

[15] Section 703(j) provides that an employer is not required by Title VII "to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race * * * employed by [the] employer." 42 U.S.C. 2000e-2(j). That provision, however, is not a restriction on the use of racial classifications "as a tool for achieving the objective of remedying past discrimination." See *Regents of the University of California* v. *Bakke, supra*, slip op. 18 n.17 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *id.* at 30 n.28; *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 340 n.20, 374 n.61; *Carter* v. *Gallagher, supra*, 452 F.2d at 329; *United States* v. *Ironworkers, Local 86, supra*, 443 F.2d at 552-554; *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047, 1053-1054 (5th Cir. 1969).

The language of Section 703(j) tracks those provisions of Title IV of the same law that prohibit the assignment of school students "to overcome racial imbalance." 42 U.S.C. 2000c(b), and 2000c-6. The Title IV provisions do not, however, prevent the use of remedial racial classifications to correct imbalances caused by unlawful discrimination, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17-18 (1971), and there is no reason to construe the identically worded section of Title VII differently.

2. *The Legislative History of the 1972 Amendments to Title VII*

Any doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which comprehensively revised Title VII. See *Regents of the University of California* v. *Bakke, supra*, 30-31 n.28 (opinion of Brennan, White, Marshall and Blackmun, JJ.); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 753 (1972).

Congress once again addressed the problem of employment discrimination because it found that in spite of the 1964 Act, many of the old patterns of racial exclusion remained. See S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971). The 1972 Act extended Title VII to new groups of employers and strengthened the authority of the Equal Employment Opportunity Commission. The Act also confirmed the authority of both federal courts and federal agencies to order race-conscious numerical relief to remedy the exclusionary effects of past discrimination.

Prior to the enactment of the 1972 amendments, the federal courts regularly, and with notable uniformity, ordered class-wide race-conscious remedies for unlawful discrimination. As the Sixth Circuit stated in an often-cited opinion, a contrary course "would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." *United States* v. *Electrical Workers, Local 38*, 428 F.2d 144, 149-150, cert. denied, 400 U.S. 943 (1970). Among the forms of class-wide affirmative relief that were ordered was the use of numerical ratios to correct the exclusionary effects of past discrimination. See, *e.g.*, *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), affirming 315 F. Supp. 1202, 1247-1250 (W.D. Wash. 1970), cert. denied, 404 U.S. 984 (1971); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); *United States* v. *Carpenters, Local*

169, 457 F.2d 210 (7th Cir.), cert. denied, 409 U.S. 851 (1972).

Congress was aware of the court decisions ordering or upholding numerical relief as a remedy for violations of Title VII. See S. Rep. No. 92-415, *supra*, at 21, 27-28; H.R. Rep. No. 92-238, *supra*, at 8, 13; 118 Cong. Rec. 1664-1676 (1972) (remarks of Sen. Javits and text of opinions); *id.* at 1676 (remarks of Sen. Williams). Amendments were introduced in both the House and the Senate to restrict federal agencies from ordering the use of numerical ratios in hiring, but the amendments were defeated. See 117 Cong. Rec. 32111 (1971); 118 Cong. Rec. 1676 (1972); *id.* at 4918. Senator Javits, the co-floor leader of the bill in the Senate, noted that the amendments would terminate "the whole concept of 'affirmative action' as it has been developed under Executive Order 11246 and as a remedial concept under Title VII."[16] *Id.* at 1664. Referring to court decisions that had approved numerical relief in Title VII cases, he stated (*id.* at 1665):

> [T]he amendment, in addition to the dismantling [of] the Executive order program, would deprive the courts of the opportunity to order affirmative action under title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment

[16] Senator Ervin was the leader in the Senate of the attack on the use of numerical ratios in the enforcement of both Title VII and the Executive Order. As we shall discuss in more detail in connection with the Executive Order, see *infra* at pages 64-70, the use of numerical relief was sustained with respect to both programs.

> and thereby further dismantle the effort to correct these injustices.

Referring to two other cases in which numerical relief had been ordered in consent decrees obtained by the Department of Justice, Senator Javits argued (*id.* at 1675) that the amendment

> would torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which could assign specific percentages of minorities that had to be hired * * *.

Senator Williams, the other co-floor leader, stated that a prohibition against numerical relief "would strip Title VII * * * of all its basic fiber." *Id.* at 1676. These views, which prevailed in the Senate, were shared by the House, where the Committee that reported out the bill wrote: "Affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 16 (1971).[17]

Congress not only rejected these restrictive proposals but also affirmatively expanded the remedial

[17] Congressional awareness of the decisions that had ordered numerical relief in Title VII cases was particularly significant in light of the understanding that, where the 1972 amendments did not specifically change the law, "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972) (section-by-section analysis of H.R. 1746).

authority of the courts. Section 706(g) was amended to add to the various remedies already authorized the sweeping power to order "any other equitable relief as the court deems appropriate." This amendment was intended to make clear that courts were meant to have "wide discretion in exercising their equitable powers to fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972) (section-by-section analysis of H.R. 1746). In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief is available under Title VII to remedy employment discrimination.

C. Title VII Permits Private Parties to Take Affirmative Action to Remedy Apparent Employment Discrimination Similar to the Relief that a Court May Order to Remedy Proven Discrimination

In enacting Title VII, Congress expressed a clear preference for voluntary compliance as a means of combating employment discrimination. See 42 U.S.C. 2000e-5(b) and 2000e-5(f)(1); *Regents of the Univesrity of California* v. *Bakke*, *supra*, slip op. 41 n.38 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-848 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). That

preference is founded upon sound public policy considerations. Employers and unions are far better situated than courts or government agencies to fashion methods for remedying past discrimination while minimizing disruption to the business and accommodating, to the greatest extent possible, the interests and expectations of other employees. Cf. *Furnco Construction Co.* v. *Waters*, No. 77-369 (June 29, 1978), slip op. 10. Voluntary compliance avoids the expense, delay, and rancor often associated with complex Title VII litigation; it reduces governmental intervention into business affairs; and it allows the government's enforcement and monitoring resources to be concentrated in those areas where they are most needed.

To be sure, Congress has equipped the courts and agencies with the authority to take coercive measures when voluntary compliance fails, but the very purpose of these measures is to " 'provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-418, quoting from *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). A rule prohibiting voluntary compliance would convert coercive relief—a last resort remedy under the law—into the sole remedy.

That voluntary remedial action may be race-conscious does not render it unlawful. Title VII was

designed in part to change habits of discrimination and to persuade employers and unions, who had been hostile or indifferent to the rights of minorities, to correct exclusionary practices. As we have noted, Congress has required employers to be race-conscious in developing, analyzing, and altering their employment practices, notwithstanding that the results of those decisions will frequently reduce the existing expectations of white employees or applicants. Indeed, Title VII permits employers to change their employment practices for racial purposes even when such changes would not be required by the Act. For example, a company and union may have established a bona fide departmental seniority system which, because of pre-Act discrimination, locks minorities into the less desirable jobs. Although such a system could withstand legal challenge, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), nothing in Title VII would prohibit the union and the employer from agreeing to alter the seniority system so as to enhance the opportunities of minority employees. "[E]ven though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement * * * the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of racial discrimination [is consistent with] a national policy objective of the 'highest priority' * * *." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778-779 (1976). Similarly, even when not required to do so by the Act,

an employer may recruit minorities, cf. *Washington* v. *Davis*, 426 U.S. 229, 246 (1976), or make use of minority referral sources to fill jobs, cf. *Furnco Construction Co.* v. *Waters*, *supra*, slip op. 4-5. Thus, "[a]lthough Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute." *Regents of the University of California* v. *Bakke*, *supra*, slip op. 19 n.17 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The court of appeals agreed that "voluntary compliance in eliminating unfair employment practices is preferable to court action, and that private settlement without litigation is the central theme of Title VII" (Pet. App. 16a). But the court held that an employer could not undertake voluntary, race-conscious action unless it proved that it had engaged in discrimination (Pet. App. 18a-19a). Moreover, the court appeared to conclude that the permissible scope of the employer's remedial action would be limited to restoring particular victims of the employer's discrimination to their rightful places in the employment scheme (Pet. App. 20a). This restriction of the permissible scope for voluntary action would effectively choke off voluntary remedial action altogether.

As a practical matter, few employers can be expected to admit or seek to prove that they have discriminated against minorities or women, since to do so would open the way for successful suits by the

victims for backpay and injunctive relief. Moreover, by imposing such a narrow limit on voluntary affirmative action, the holding of the court of appeals would create an unjustified and arbitrary distinction between the kind of action that can be taken in response to a lawsuit and the kind of action that can be taken on a voluntary basis. Indeed, the fallacy of an approach that conditions affirmative remedial action on an admission or proof of past discrimination is well illustrated by the facts of the present case. In 1974, seven blacks were selected for the Gramercy training programs. If those blacks had accused Kaiser of past discrimination and Kaiser had concluded that those allegations had factual support, the company presumably could have settled the matter by offering these seven persons priority selection into a training program. Similarly, if the government or a class of black employees had accused Kaiser of discriminating on a class-wide basis, Kaiser could have agreed, either by consent decree or by conciliation before litigation, to adopt affirmative action measures such as instituting training programs like the ones in this case. In a suit collaterally attacking this remedy, Kaiser would not be required to admit or prove its past discrimination. In fact, consent decrees and conciliation agreements commonly contain affirmative action obligations, including goals and timetables; but their validity is not undermined by boilerplate disclaimers of past discrimination. See, *e.g.*, *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, *supra*.

The Fifth Circuit made the same point when it upheld the nationwide steel consent decree, which contained numerical goals for craft training identical to those involved in this case, see *United States* v. *Allegheny-Ludlum Industries, Inc., supra,* 517 F. 2d at 849:

> Parties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope for recovery and hence no basis for a compromise.

See also *United States* v. *City of Jackson,* 519 F.2d 1147, 1152 (5th Cir. 1975).

Of course, consent decrees and conciliation agreements are not immune from judicial scrutiny when they affect the interests of third parties. Voluntary affirmative action programs devised prior to litigation should be subject to similar scrutiny, so as to ensure that the programs are reasonably tailored to the apparent violation that they are designed to remedy. But, as in the case of settlement agreements and consent decrees, the court should not insist on clear proof of a violation by the employer against the particular persons benefitted by the affirmative action program.

The Equal Employment Opportunity Commission has promulgated guidelines setting standards for the approval of voluntary affirmative action programs under Section 713(b)(1) of Title VII, 42 U.S.C. 2000e-12(b)(1). Affirmative Action Guidelines, 44 Fed. Reg. 4421 (1979). The Commission's Guidelines state what we submit is the proper standard

for evaluating voluntary affirmative action programs. Under the Guidelines, affirmative action is appropriate where an employer, after analyzing its employment practices, finds a reasonable basis for believing that race-conscious action is required to bring it into compliance with Title VII or to remedy past violations of the Act. 44 Fed. Reg. 4426-4428 (1979). Pertinent portions of the Guidelines are reproduced as Appendix B to this brief.

The Guidelines represent the considered judgment of the Commission, the administrative body charged with the primary responsibility for the enforcement of Title VII. Moreover, the Guidelines incorporate the principles developed in prior administrative policy statements on the question of affirmative action by agencies that share with the Commission the responsibility for enforcing the Act. See Memorandum on Goals and Timetables, 1 Empl. Prac. Guide (CCH) ¶ 3775 (1973) (reproduced as Appendix D to this brief); Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38814 (1976) (reproduced as Appendix C to this brief); Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978).

As an administrative interpretation of Title VII by the enforcing agency, the Guidelines are "entitled to great deference." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 433-434.[18] Because "the Act and

---

[18] See also, *e.g., Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 142 n.4 (1977); *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 279-280 (1976); *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 429, 430-435. This is not a situation,

its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Ibid.* Indeed, four members of this Court have specifically endorsed the Commission's Guidelines as "authorizing employers to adopt racial preferences as a remedial measure when they have a reasonable basis for believing that they might otherwise be held in violation of Title VII." *Regents of the University of California* v. *Bakke, supra,* slip op. 41 n.38 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).[19] Under the standard set forth in the Guidelines, the affirmative action program in this case is lawful.

D. Kaiser Could Reasonably Believe It Would Be Found Liable for Discriminating Against Blacks at the Gramercy Plant

Kaiser and the Steelworkers adopted the race-conscious training programs in part because of fear of Title VII suits by minority applicants or employees (Pet. App. 3a, 65a). Although Kaiser officials insisted there had never been discrimination at

---

such as was presented in *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-145 (1976), where a Commission guideline was inconsistent with prior and more contemporaneous Commission interpretations, as well as with interpretations of other federal agencies charged with enforcing anti-discrimination laws. See *Nashville Gas Co.* v. *Satty, supra,* 434 U.S. at 142 n.4.

[19] Although the opinion in *Bakke* referred to the Commission's proposed Guidelines, the final Guidelines have since been published. They contain the same standard for approval of affirmative action programs.

the Gramercy plant, they admitted that they were not confident that a court would agree with them, in light of the low minority representation in the plant's unskilled jobs and the near absence of blacks from the skilled craft positions (A. 83, 97, 145).

Because Kaiser and the Steelworkers were in the awkward position of seeking to defend their training programs without admitting liability for previous discrimination against blacks, and because Weber had no incentive to prove that Kaiser had discriminated against blacks in the past, the record does not establish in detail the factual basis for Kaiser's concerns. Even from the limited record developed at trial, however, it is clear that Kaiser had ample grounds to conclude that it could be held liable for discriminating against blacks at the Gramercy plant.

The record shows that in 1969 only about 10 percent of Kaiser's unskilled production workers were black, although the local labor force at that time was approximately 39 percent black. This disparity is so great that in a suit alleging discrimination against blacks at the Gramercy plant, it would constitute prima facie evidence of unlawful discrimination in hiring. See *Dothard* v. *Rawlinson,* 433 U.S. 321, 329-331 (1977); *Hazelwood School District* v. *United States,* 433 U.S. 299, 307-309 (1977); cf. *Castaneda* v. *Partida,* 430 U.S. 482, 496-497 (1977). The testimony at trial that Kaiser had a no-discrimination hiring policy and had sought to hire the "best qualified" applicants (A. 77-78, 82) would have done nothing to rebut the strong inference of discrimina-

tion arising from the huge disparity between the black representation in the unskilled jobs at the Gramercy plant and the black representation in the local labor force. See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342-343 n.24 (1977); *Dothard* v. *Rawlinson, supra; Albemarle Paper Co.* v. *Moody, supra.*

There was even more cause for Kaiser's concern that it could be found liable for discrimination in hiring for the skilled craft jobs at the Gramercy plant. Kaiser adopted the training programs because it "had no blacks in the crafts to speak of" (A. 83). At the time it adopted the programs, there were only five blacks among almost 300 craftsmen at the Gramercy plant. Although there was no evidence at trial of the percentage of skilled minority craftsmen in the local labor market, the minority representation in the craft jobs was so low as to approach the "inexorable zero." See *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 342 n.23.

The testimony at trial that black representation in the craft jobs at Gramercy was low because skilled black craftsmen were unavailable is subject to question in light of census statistics regarding the number of black craftsmen in the area.[20] Those statistics show that although blacks are under-represented in

[20] Courts regularly take judicial notice of census data in Title VII cases. See, *e.g.*, *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430 n.6; *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1185 & n.36 (5th Cir.), cert. denied, 429 U.S. 861 (1976).

the skilled crafts in Louisiana, they are not nearly so underrepresented as they were in the craft jobs at the Gramercy plant. According to 1970 census data, blacks constituted 22.7 percent of the State's total experienced male civilian labor force. U.S. Bureau of the Census, *1970 Census of Population: Characteristics of the Population*, Vol. 1, Part 20, Louisiana, table 172. Of the craftsmen and kindred workers, 15.7 percent were black. *Ibid.*[21] Unless conditions in the Gramercy area were grossly atypical of the State and the neighboring areas of New Orleans and Baton Rouge, the availability of skilled black craft workers was much greater than their representation in the

[21] According to the census figures, the statewide black representation in the skilled crafts covered by the affirmative action programs ranged from 21.3 percent (for carpenters) to 3.0 percent (for electricians). Blacks comprised 14.6 percent of the State's mechanics and repairmen and 10.4 percent of the State's machinists. U.S. Bureau of the Census, *1970 Census of Population: Characteristics of the Population*, Vol. 1, Part 20, Louisiana, table 172.

With respect to the Gramercy area itself, published census data indicate that more than 20 percent of the craft and kindred workers in St. James and St. John the Baptist parishes were black. *Id.* at tables 122 and 127. Data for these parishes are not broken down in detail by craft because these parishes are not in a Standard Metropolitan Statistical Area. But the detailed statistics for the adjacent New Orleans and Baton Rouge SMSA's, from which the Gramercy plant recruited (A. 62), are consistent with those for the State as a whole. U.S. Bureau of the Census, *1970 Census of Population, supra*, at table 172. Moreover, because the black representation in the labor force is approximately twice as great in the Gramercy area as in the State as a whole, it is reasonable to assume that the proportion of blacks in the skilled crafts in the area is at least as high as in the State generally.

craft categories at the Gramercy plant prior to the institution of the training programs.

The testimony of Kaiser officials that Kaiser was unable to recruit significant numbers of blacks who could meet its qualifications for entry into the craft categories is of little probative force in the absence of evidence as to what those qualifications were. One qualification that was revealed at trial was a requirement that an applicant have at least five years' industrial experience in the craft for which he was applying. As Kaiser officials admitted, this requirement disqualified blacks who had been excluded from industrial craft jobs and training programs in the past. Because of its exclusionary racial effect, the requirement of lengthy prior experience would be lawful only if justified as a business necessity. See *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 348-349.

In evaluating the basis for Kaiser's concern that it could be found to have discriminated against blacks in the craft jobs at Gramercy, it is instructive to consider Kaiser's experience at its two other Louisiana plants. At the same time that Kaiser was defending its affirmative action efforts in this case, it was defending employment discrimination suits brought by black employees of its plants in Baton Rouge and Chalmette, Louisiana. Litigation arising from its Baton Rouge plant was settled by a consent decree requiring Kaiser to pay $255,000 to the plaintiff class. *Burrell* v. *Kaiser Aluminum & Chemical Corp.*, Civ. Action No. 67-86 (M.D. La.), consent decree

filed February 24, 1975. And in the action arising from the nearby Chalmette plant, the plaintiffs were held to have established a prima facie case of discrimination against blacks in hiring for craft positions on the basis of statistics strikingly similar to those of the Gramercy plant before the 1974 training program was instituted. See *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978). The Fifth Circuit noted in the *Parson* case that Kaiser had imposed a requirement of prior industrial experience as a prerequisite to entry into the craft positions, just as it had done at Gramercy, and it held that the preclusive effect of that requirement on blacks was so substantial as to impose on Kaiser the burden of showing that the prior experience requirement has " 'a manifest relationship' " to the legitimate needs of the craft positions. 575 F.2d at 1390. The court noted that a defense of business necessity to validate the prior experience requirement "must meet rigorous standards." 575 F.2d at 1390 n.33.[22]

Accordingly, even on the limited record available in this case, it is clear that Kaiser faced a very

---

[22] The court in *Parson* noted that in the past Kaiser had required applicants for craft positions to pass the Wonderlic test and a written test on craft skills, and to have a high school diploma—requirements that the court termed "incidents of past bias." 575 F.2d at 1390. There was no evidence of what prerequisites had been imposed at the Gramercy plant, in addition to the requirement of prior industrial experience, but there were allusions in the course of trial to other qualifications that were required for entry into the craft categories at Gramercy (A. 62, 63, 65, 71).

real prospect of being found liable for discriminating against blacks at Gramercy, at least in hiring for craft jobs, if a suit had been brought. The statistical case would have been extraordinarily strong; the flat five-year requirement of prior industrial experience would have been difficult to defend on grounds of business necessity;[23] and Kaiser's protestations that it had followed a policy of non-discrimination would have been entitled to little or no weight.

E. The Gramercy Training Programs Were Appropriate Remedies for the Apparent Title VII Violations In Hiring for the Craft Positions

The remedial plan adopted by Kaiser and the Steelworkers was appropriately designed to remedy the effects of the apparent past discrimination at Gramercy while at the same time minimizing the adverse impact on the expectations of incumbent white employees. The plan had several discrete features: it provided for training craftsmen rather than hiring craftsmen who were already trained; it made the training program available exclusively to employees

[23] It is not established in the record that any amount of prior industrial experience is necessary to perform each of the craft jobs. Even if some level of skill is necessary, Kaiser's flat requirement of five years of industrial experience would prevent black applicants from proving that they had the requisite skills, which they might have acquired, for example, in vocational education, in military service, by self-training, or in less than five years of work. The evidence that the five-year experience requirement was waived in some cases at the Chalmette plant suggests that the requirement may not have been a business necessity. See *Parson* v. *Kaiser Aluminum & Chemical Corp., supra,* 575 F.2d at 1381.

within the plant; it set a goal of obtaining 39 percent black representation in the craft categories; and it provided that until that level was reached, half the vacancies in the training programs would be reserved for blacks and women, if that many qualified blacks and women were available.

Each of the features of the plan was reasonable and appropriate under the circumstances. The decision to train craftsmen rather than to hire craftsmen who were already trained was reasonable in light of Kaiser's professed difficulty in locating black craftsmen with the necessary training or experience. The decision to limit the training program to employees already working in the plant was also reasonable in light of the union's preference for training programs that would enhance the employment opportunities of incumbent employees rather than continuing to make the most attractive jobs at the plant available only to persons hired from outside the plant.

Of course, respondent does not complain that new training programs were established for the craft jobs. Nor does he complain that incumbent employees were selected for the programs. Both of these decisions, motivated by the company's desire to engage in affirmative action, provided new opportunities for respondent and the class he represents. But it was the decision to offer training programs to current employees that necessitated the use of separate bidding lists for blacks and whites. If Kaiser had filled its training program with applicants from outside

the plant, random selection presumably would have produced a class of trainees that was 39 percent black—equal to the black representation in the local labor force. Within the plant, however, blacks comprised only 15 percent of the work force. Moreover, the blacks in the plant were concentrated in the lower ranges of the seniority lists because prior to 1969, the plant's work force was only about 10 percent black. Once having decided to make the training programs available to current employees, Kaiser and the Steelworkers thus had to devise a system that would cure the basic evil that the program was designed to remedy—the failure to hire black craftsmen. With the proportion of blacks in the plant's work force so low, particularly among the most senior employees, strict reliance on seniority to select trainees would simply have perpetuated the effects of previous hiring practices. Thus, it was reasonable for Kaiser and the Steelworkers to try to break the hold of those practices by establishing a goal of having 39 percent black craftsmen, while using separate bidding lists for the training program.

The court of appeals deemed the training programs inappropriate in part because they "meddled" with seniority. But the training programs did not upset any previous expectations based on the seniority system at Gramercy. Prior to the establishment of the training programs, unskilled incumbent employees had no expectations whatever for entry into the skilled craft jobs. The training programs created wholly new expectations and opportunities for incumbent employees. The company and union agreed

to make this training newly available to the unskilled employees, but on terms other than the traditional strict seniority basis. Even if employees may have a general expectation that employment benefits ordinarily will be allocated on the basis of seniority, that expectation is subject to modification through collective bargaining, see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), particularly for the purpose of countering the effects of past discrimination. *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 778-779.

Finally, the use of a one-for-one ratio in selecting trainees was reasonable, for several reasons. First, even though the training programs were undertaken to provide a means for blacks to gain entry to the skilled crafts, whites were not excluded from the program. By allocating half the vacancies to whites, the programs offered new training and employment opportunities for all of the plant's employees. See *Carter* v. *Gallagher*, *supra*, 452 F.2d at 330. Second, because only qualified employees were allowed to bid for the programs, and because prior experience and training were not required, "less qualified" blacks were not preferred over "more qualified" whites (see Pet. App. 20a). Third, the one-for-one selection ratio for minorities and women is not indefinite; according to the 1974 agreement, it will end when minority representation in the craft categories is equal to minority representation in the local work force. See *Rios* v. *Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974). Fourth, to the extent that

women are selected for the program and mostly white craftsmen continue to be hired directly from outside the plant (see page 10, *supra*), the selection ratio may not result in more black craftsmen than would have been chosen had selections for the training programs been made at random from the local labor force.[24]

It is true, of course, that the blacks selected for the training program had not been identified as victims of prior discrimination at the Gramercy plant. But, as we have discussed, class-wide numerical relief need not always be limited to identifiable victims. This principle is particularly applicable in the context of voluntary compliance. An identification of individual victims would require an admission of unlawful discrimination in the past and a specification of those persons who suffered as a result of that discrimination. An employer could not ordinarily be expected to attempt voluntary compliance at the price of conceding back pay liability to each of the "identified" victims.

Moreover, there is no mechanism available in the context of voluntary remedial programs for identifying specific victims from the broader category of po-

[24] It is, accordingly, unnecessary in this case for the Court broadly to decide the circumstances in which, and the extent to which, "catch-up" numerical relief can properly be used as a remedial device under Title VII. By utilizing a substantially higher percentage of minorities than are reflected in the local work force, such remedies enable the latter percentage to be approximated, and the remedial use of numerical ratios to end, in a time span shorter than that required for a complete personnel turnover. They have been widely used in court-ordered remedies. See *e.g.*, cases cited in note 14, *supra*.

tential victims;[25] there is no ready equivalent to the adjudicatory "remedy" stage proceedings in a "pattern or practice" suit. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 371-372. And even if some mechanism could be devised for identifying victims in the course of voluntary compliance efforts, the cost and delay of that effort would be prohibitive.[26] Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified. See *Equal Employment Opportunity Commission* v.

[25] Each black selected for the programs was at least a potential victim of discrimination. Blacks hired at the Gramercy plant were not able to bid for skilled craft jobs because of the five years' prior industrial experience requirement, which had a severe exclusionary racial effect. If that requirement were not validated, all blacks hired when it was in effect would be in a broad class of potential victims. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 357-371.

[26] In the nationwide steel consent decree case, it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would consume 28 years of trial time. *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 851 n.28.

American Telephone & Telegraph Co., supra, 556 F.2d at 177.

In sum, the Gramercy training programs were a reasonable and appropriate response to a problem that was accurately perceived as creating a potential for liability under Title VII. That the plan was race-conscious is directly attributable to the previous hiring practices at Gramercy that created the potential for liability and to the perception by Kaiser and the Steelworkers that appropriate voluntary action would be preferable to inaction, which could result in litigation and ultimately in remedial orders imposed by a court rather than designed by Kaiser and the Steelworkers.

F. Title VII Authorizes Employers To Take Affirmative Action in Response to Executive Order 11246

Kaiser and the Steelworkers adopted their race-conscious training programs in part to satisfy the affirmative action requirements of Executive Order 11246 (Pet. App. 65a; A. 93). The Executive Order and the regulations promulgated under the authority of the Order require government contractors such as Kaiser not only to refrain from discrimination in employment, but also to take affirmative action to redress the underutilization of minorities in their work force.

The court of appeals held that the Executive Order did not justify the use of a racial criterion for selection to the training programs at Gramercy in the absence of proof of discrimination in hiring or promotion at the Gramercy plant (Pet. App. 25a). To the extent the Executive Order purports to authorize the use of a racial criterion without proof that the employer has discriminated, the court held that it is inconsistent with Title VII and must give way (*ibid.*).

We disagree with the court of appeals that the Executive Order program conflicts with Title VII. It is clear from the legislative history that Congress considered the Executive Order program to be consistent with Title VII and understood that the affirmative action obligations imposed by the Executive Order are not premised on any finding of previous discrimination by each affected employer. Therefore, action taken voluntarily in conformity with the Executive Order does not violate Title VII.

There is, however, no need in this case to consider whether, or to what extent, Title VII permits the Executive Order to authorize or require government contractors to undertake affirmative action measures that would be impermissible if undertaken by other employers. For the reasons we have shown, the Gramercy training programs were proper under Title VII wholly apart from the fact that Kaiser is a government contractor. Therefore, the role of the Executive Order in this case, to the extent it influenced the decision of Kaiser and the Steelworkers to adopt those programs, was merely to condition the government's willingness to deal with Kaiser on the adoption of affirmative action measures that Kaiser and the Steelworkers were free to adopt voluntarily

whether they wished to do business with the government or not.[27] This is a case, in other words, in which the Executive Order operates in particularly close tandem with Title VII.

1. *The Executive Order Program Requires Government Contractors to Take Affirmative Action, Without Need for Proof of Prior Discrimination by Each Contractor*

Racial discrimination in employment by government contractors has been prohibited by Executive Orders of every President since Franklin D. Roosevelt.[28] But the early anti-discrimination efforts failed. Twelve years after President Roosevelt's first order was issued, a study of its effectiveness revealed that "the nondiscrimination provision is almost forgotten, dead and buried under thousands of words of standard legal and technical language in Government pro-

[27] See 42 Op. Att'y Gen. 405, 409 (1969):

> [I]t is important to distinguish between those things *prohibited* by Title VII as to all employers covered by that act and those things which are merely *not required of* employers by that act. The United States as a contracting party may not require an employer to engage in practices which Congress has prohibited. It does not follow, however, that the United States may not require of those who contract with it certain employment practices which Congress has not seen fit to require of employers generally.

[28] See, e.g., Exec. Order 8802, 3 C.F.R. 957 (1938-1943 Compilation) (Pres. Roosevelt); Exec. Order 10210, 3 C.F.R. 390 (1949-1953 Compilation) (Pres. Truman); Exec. Order 10479, 3 C.F.R. 961 (1949-1953 Compilation) (Pres. Eisenhower; Exec. Order 10925, 3 C.F.R. 448 (1959-1963 Compilation) (Pres. Kennedy).

curement contracts." President's Committee on Government Contract Compliance, *Equal Economic Opportunity* 3 (1953). Most contractors had made little effort to comply with the orders, and governmental enforcement—based entirely on education and persuasion to obtain voluntary compliance—was ineffective. *Ibid.* In 1961, after further study revealed that the contract compliance program had not significantly upset habitual patterns of discrimination,[29] the President determined that passive measures were futile. President Kennedy therefore issued Executive Order 10925, 3 C.F.R. 448 (1959-1963 Compilation), which not only prohibited discrimination but also required government contractors to "take affirmative action to ensure" non-discrimination.[30] These dual provisions were repeated in Executive Order 11246, issued by President Johnson four years later.

Again, however, little progress was made. The Department of Labor, which was given general responsibility for enforcing Executive Order 11246, relied

[29] Committee on Government Contracts, *Patterns for Progress* (Final Report) 14 (1960). Another study found that "there is little awareness of the nondiscrimination requirement among the men who do the actual hiring * * *." United States Commission on Civil Rights, *Employment* 92 (1961).

[30] The preamble to Executive Order 10925 stated that the Order was issued after "a review and analysis of existing Executive orders, practices, and government agency procedures relating to government employment and compliance with existing non-discrimination contract provisions [which] reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity."

initially on persuasion and generalized recommendations. See R. Nathan, *Jobs and Civil Rights* ch. 4 (1969); Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. Rev. 590 (1969). Widespread discriminatory practices resisted these modest efforts. Exclusionary conditions proved particularly intractable in the skilled craft positions. For many years, the exclusion of minorities from membership in craft unions and from entry into union and employer-operated apprenticeship programs, and the refusal of employers to hire skilled minorities for craft positions, resulted in one of the most extreme patterns of employment discrimination in the national economy.[31] Although the pattern of discrimination in skilled craft employment was confirmed by judicial findings of discrimination in dozens of cases brought under Title VII,[32] judicial remedies in specific cases

[31] See, e.g., F. Marshall and V. Briggs, Jr., *The Negro and Apprenticeship*, ch. III (1967); F. Marshall, *The Negro Worker* 64-81 (1967); H. Northrup, *Organized Labor and the Negro* 17-47 (1944); United States Commission on Civil Rights, *Employment* 91-93, 128-131 (1961); W. Gould, *Black Workers in White Unions* ch. 10 (1977).

[32] Many of the leading cases in the employment discrimination area involved discrimination against blacks in admission to the skilled crafts. See, *e.g.*, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976); *United States* v. *Masonry Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Operating Engineers, Local 520*, 476 F.2d 1201 (7th Cir. 1973); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); *United States* v. *Electrical Workers, Local 38*, *supra*; *United States* v. *Ironworkers, Local 86*, *supra*.

A number of the cases in which discrimination has been found in the skilled crafts have arisen in Louisiana. See, *e.g.*, *Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Cox* v. *Allied Chemical Corp. Local 216*, 382 F. Supp. 309 (M.D. La. 1974); *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314 (E.D. La. 1970).

had little nationwide impact. In 1969, 58 percent of the nation's local craft unions reported to the Equal Employment Opportunity Commission that they had no black members; nationwide, the electricians unions were 1.9 percent black; the ironworkers 1.7 percent black; the plumbers 0.8 percent black; and the sheet metal workers 0.7 percent black. See United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* 29-30 (1976); W. Gould, *Black Workers in White Unions* 282 (1977).

The Department of Labor determined that more specific remedies were necessary to deal with the problem. In the late 1960's, the Department issued plans for Philadelphia and other areas requiring government contractors to make good faith efforts to meet pre-determined percentage ranges of minority workers in craft positions on construction jobs. These plans were based on administrative findings that the local unions had excluded minorities and that the contractors perpetuated that exclusion by

hiring only workers referred by the unions.[33] The Philadelphia Plan was premised on a hiring ratio of one minority craftsman for each non-minority craftsman for a period of four years, resulting in a minority participation level of approximately 20 percent in the six craft categories affected.[34] The Philadelphia Plan was upheld as a valid exercise of executive power and consistent with Title VII,[35] as were other local plans.[36]

The approach taken in the Philadelphia Plan proved to be of limited utility. With more than 150,000 government contractors employing more than 30 million

[33] See, e.g., *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra,* 442 F.2d at 163 (Philadelphia Plan); 41 C.F.R. Part 60-5 (1977) (District of Columbia Plan); 41 C.F.R. Part 60-6 (1977) (San Francisco Plan); 41 C.F.R. Part 60-8 (1977) (Detroit Plan); 41 C.F.R. Part 60-10 (1977) (Camden, N.J., Plan); 41 C.F.R. Part 60-11 (1977) (Chicago Plan).

[34] Pertinent portions of the Philadelphia Plan are reproduced as Appendix A to this brief. The full text of the Philadelphia Plan is reprinted in *The Philadelphia Plan: Hearings on S.931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 26-38 (1969). The one-for-one ratio is discussed in Section 3(f) of the Order, *id.* at 33-34.

[35] *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra.*

[36] See, *e.g., Southern Illinois Builders Ass'n* v. *Ogilvie,* 327 F. Supp. 1154 (S.D. Ill. 1971), affirmed, 471 F.2d 680 (7th Cir. 1972); *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D.N.J. 1970); *Weiner* v. *Cuyahoga Community College Dist.,* 238 N.E.2d 839 (1968), affirmed, 18 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970).

workers,[37] it was apparent that it would be impossible to design and impose specific compliance plans for all government contractors throughout the country. Accordingly, the Department of Labor turned to a more general approach to the enforcement of the Executive Order, which would rely more heavily on self-analysis and voluntary compliance.[38] In late 1971, the Department issued Order No. 4, 36 Fed. Reg. 23152, a regulation designed to provide guidance for non-construction government contractors, such as Kaiser, in evaluating their use of minority employees and in developing affirmative action programs that would bring them into compliance with the Executive Order.[39]

Order No. 4 requires contractors to analyze their work forces and identify areas in which minorities and women are underutilized in comparison with their availability in the relevant labor force (41 C.F.R. 60-2.11).[40] Where deficiencies are found to

[37] See United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, To Eliminate Employment Discrimination,* Vol. V, 390.

[38] Like Title VII, the Executive Order program is largely premised on voluntary action. See Sections 207 and 209(b) of the Executive Order and 41 C.F.R. 60-1.24(c)(2).

[39] Order No. 4, as amended, is codified at 41 C.F.R. Part 60-2. The regulations governing the affirmative action obligations of construction contractors are codified at 41 C.F.R. Part 60-4.

[40] The factors to be considered include the proportion of minorities in the local population and in the local labor market, the availability of skilled minorities and the degree of training that could reasonably be undertaken to make all job classes open to minorities.

exist, contractors must seek to eliminate or modify employment practices causing or perpetuating the underutilization. In addition, employers must take affirmative action to redress the underutilization of minorities in their work forces, regardless of whether the underutilization was caused by their discrimination or that of other employers. 41 C.F.R. 60-2.12, 60-2.24. See Summary on Retaining OFCC in the Department of Labor, 118 Cong. Rec. 1395-1396 (1972). The adequacy of the employer's self-analysis and the appropriateness of any resulting affirmative action plans are reviewed and approved through the federal contract compliance program.

In Order No. 4, the Department of Labor stated that based upon its experience with compliance reviews under the Executive Order programs and the contractor reporting system, it found that skilled craft jobs are among those in which "minority groups are most likely to be underutilized." 41 C.F.R. 60-2.11. The Department therefore instructed contractors to direct special attention to such jobs in conducting their analyses and setting their goals. Moreover, in light of a finding by the Committee on Government Contracts that minorities are underrepresented in skilled jobs in part because they have had fewer training opportunities open to them,[41] the Order directed contractors to consider undertaking training programs, if reasonable, as a means of making more jobs available to minorities. 41 C.F.R. 60-2.11(b)(1)(viii).

[41] Committee on Government Contracts, *Patterns for Progress* (Final Report), *supra*, at 15.

2. *The Executive Order Program is Consistent with Title VII*

The legislative history of Title VII—particularly the legislative history of the 1972 amendments to the Act—establishes that affirmative action taken pursuant to the Executive Order is not barred by Title VII. *Regents of the University of California* v. *Bakke, supra*, slip op. 30 n.28 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

At the time Title VII was enacted, Congress was well aware of the Executive Order program, and it approved the efforts of various federal agencies to eliminate employment discrimination in industries receiving federal contracts.[42] See Section 709(d) of Title VII, 42 U.S.C. 2000e-8(d); H.R. Rep. No. 914, 88th Cong., 1st Sess. 28-29 (1963). Moreover, it was clear that Title VII was not intended to impede the authority of the President, under the Executive Order program, to combat discrimination among federal contractors. In their interpretative memorandum, which explained Title VII to the Senate at the commencement of the Senate debate, Senators Clark and Case outlined the function and authority for the

[42] The substantive provisions of Executive Order 11246 are identical to those of Executive Order 10925, which was in effect at the time Title VII was enacted, except that Executive Order 11246 requires non-discrimination and affirmative action on grounds of sex, requirements that became effective in 1968. See Executive Order 11375.

Executive Order program and added that Title VII "has no effect on the responsibilities of the [President's Committee on Equal Employment Opportunity] or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts." 110 Cong. Rec. 7215 (1964). See also *id.* at 2575 (remarks of Rep. Celler); 109 Cong. Rec. 3248, 11178 (1963) (messages of Pres. Kennedy).[43]

When Title VII was amended in 1972, the Secretary of Labor's regulations imposing numerical requirements on construction contractors in specific locations had been in effect for several years, and the general regulations imposing affirmative action requirements on all government procurement contractors had recently been promulgated. The goals and timetables required under both programs were imposed without regard to whether each employer covered by the program had discriminated in employment. See 118 Cong. Rec. 1397 (1972). As the debates over the 1972 Act make clear, Congress was aware of these developments.[44] Moreover, in the

[43] Senator Tower introduced an amendment that would have made Title VII the exclusive federal remedy for employment discrimination, see *id.* at 13650-13652. The amendment was defeated, thus supporting the view that Congress contemplated the continuation of the Executive Order program.

[44] Congress's attention had been focused on the Philadelphia Plan two years earlier, when after spirited debate, both houses rejected efforts to curb the Executive Order program on the ground that it imposed numerical hiring requirements. See Comment: *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 747-757 (1972).

course of its consideration of the 1972 Act, Congress demonstrated in several respects its approval of the Executive Order program and its view that the program was consistent with Title VII, even when it required affirmative action by employers who had not themselves discriminated.

First, the debate over whether to leave the enforcement of the Executive Order with the Department of Labor demonstrated Congress's concern that the Executive Order be vigorously enforced in tandem with Title VII. The 1972 bill initially contained a provision that would have transferred enforcement of the Executive Order from the Labor Department to the Equal Employment Opportunity Commission. The transfer was proposed because of sentiment in Congress that the Labor Department had not been vigorous enough in enforcing the Executive Order. See S. Rep. No. 92-415, 92d Cong., 1st Sess. 29-31 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 14-16 (1971); 118 Cong. Rec. 1387-1391 (1972) (remarks of Sen. Williams); *id.* at 1394 (remarks of Sen. Javits). The Senate Committee wrote (S. Rep. No. 92-415, *supra*, at 31):

> The rights of minorities and women are too important to continue this important function in an agency that has not really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity. It should have a chance to operate in a fresh atmosphere with an agency

that has Equal Employment Opportunities as its sole priority.

In support of the transfer provision, Senator Williams referred to the affirmative action obligations imposed by the Executive Order (118 Cong. Rec. 1389 (1972)):

> The key to the Office of Federal Contract Compliance's approach is affirmative action. It is not a situation, although it could well be called one, of correcting persisting discrimination in its most well understood form. It involves an effort regardless of the past history of the employer to upgrade and improve its minority work force.

On the Senate floor, Senator Saxbe proposed an amendment to strike the transfer provision from the bill. Although he disagreed that the Department of Labor had failed to enforce the Executive Order adequately, his view of the affirmative action obligations imposed by the Order was the same as Senator Williams'. He noted that unlike court-ordered remedies under Title VII, numerical remedies under the Executive Order are not contingent upon findings of unlawful discrimination (*id.* at 1385):

> The Executive order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

Senator Saxbe's amendment was adopted. *Id.* at 1398.[45]

Second, Senator Ervin introduced a series of amendments intended to prevent federal officials from imposing numerical hiring requirements under the Executive Order program. See *id.* at 1662, 3367, 4917. The principal amendment would have prohibited any "department or agency or officer of the United States" from requiring any employer to hire "persons of a particular race * * * in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 118 Cong. Rec. 1663 (1972). As Senator Ervin freely acknowledged, the amendments were intended to curb the Philadelphia Plan in particular and the entire Executive Order program in general (*ibid.*).

---

[45] Senator Javits also distinguished between the two purposes of the Executive Order program. Quoting from the Third Circuit's decision in *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra,* he noted that the court had upheld the Executive Order program not only as a means to remedy past discrimination in the six building trades there at issue, but also to encourage full utilization of all minority-group employees. 118 Cong. Rec. 1664 (1972). See also *id.* at 4918 (remarks of Sen. Javits).

Members of the House similarly recognized that the Executive Order remedies were not limited to cases of proven discrimination. See, *e.g.*, 117 Cong. Rec. 32091 (1971) (remarks of Rep. Ford); *id.* at 32105 (remarks of Rep. Mink). And in both the House and Senate, there were repeated references to the *Contractors Association* decision, which had held (442 F.2d at 177) that numerical remedies under the Executive Order program were justified "without regard to a finding as to the cause of the situation." See, *e.g.*, 117 Cong. Rec. 31963 (1971); *id.* at 31975; 118 Cong. Rec. 1671 (1972).

As we have noted in connection with the discussion of the remedies Congress intended to be available under Title VII, Senator Javits led the opposition to the Ervin amendments and characterized them as an attack on "the Philadelphia Plan and similar plans in other cities, and beyond that, the whole concept of 'affirmative action' as it has been developed under Executive Order 11246 and as a remedial concept under Title VII" (118 Cong. Rec. 1664 (1972)). He read into the Congressional Record the Third Circuit's opinion upholding the Philadelphia Plan (*id.* at 1665-1671), and he urged the Senate to confirm the principle that the government "has discretion as to whom it will contract with and will not contract with, to affirmatively encourage nondiscrimination and full utilization of minority group employees and women," *id.* at 4918. The Ervin amendments were each defeated. A similar amendment was proposed in the House; it too was defeated. 117 Cong. Rec. 32111 (1971).

Finally, having rejected the proposal to prohibit the use of numerical hiring goals in the Executive Order program, Congress nonetheless adopted a procedural provision, which was codified as Section 718 of Title VII, 42 U.S.C. 2000e-17, to protect contractors against possibly arbitrary contract termination actions by the OFCCP. Thus, Congress's decision to leave the substantive provisions of the Executive Order program unchanged does not represent a determination to forgo legislating on this matter altogether. Congress modified those aspects of the

Executive Order program with which it disagreed, but the substance of the program—including the use of affirmative remedies—was deliberately left intact.

In sum, Congress recognized that although the Executive Order and Title VII derive their authority from different sources and operate in somewhat different ways, the two are wholly compatible.[46] As the House Committee noted, in reporting the bill that became the Equal Employment Opportunity Act of 1972, "The two programs [Title VII and the Executive Order program] are addressed to the same basic mission—the elimination of discrimination in employment. The obligations imposed on the government contractor by the Executive Order * * * reinforce the obligations imposed by Title VII." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 15 (1971).

The court of appeals thus erred in holding that the Executive Order is inconsistent with Title VII to the extent that it imposes affirmative action obligations on an employer in the absence of proof of previous discrimination by that employer. Congress expressed its desire not to prohibit the Department of Labor from urging, and employers from adopting, affirma-

---

[46] That Congress viewed Title VII and the Executive Order program as compatible is further underscored by the addition of Section 715 as one of the 1972 amendments to the Act. That provision, which established the Equal Employment Opportunity Coordinating Council, was added to ensure coordination between the Executive Order program and Title VII enforcement efforts. See 118 Cong. Rec. 1398 (1972) (remarks of Sen. Javits).

tive action plans of the kind contemplated by the Executive Order program.

3. *The Gramercy Training Programs Were Consistent With the Executive Order Program*

The race-conscious measures taken by Kaiser and the Steelworkers at the Gramercy plant closely parallel the kinds of affirmative action programs that have been required by the Executive Order at least since the time of the Philadelphia Plan. As we have noted, the Philadelphia Plan was premised on findings of discrimination in the local industry that was the target of the plan, not on any findings that the contractors who received federal funds had themselves been guilty of employment discrimination. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra,* 442 F.2d at 163, 173. The Philadelphia Plan was an attempt to eradicate the effects of employment discrimination in the local construction industry as a whole, not simply to combat discriminatory actions taken by each employer or union.

Similarly, Kaiser and the Steelworkers sought to eliminate the effects of previous employment discrimination that had blocked the entry of minority workers into skilled craft jobs. Kaiser officials were aware that the paucity of trained black craftsmen was attributable in large part to discrimination in the building trades industry. One of the Kaiser officials testified (A. 63):

> Most of the training for craftsmen over the years has come through the building trades. They have apprenticeship programs, whereby a candidate spends four or five years in an apprenticeship program, and he graduates as a skilled craftsman. Until just recently, blacks did not get into those building trades programs.

Kaiser's director of equal opportunity affairs testified to the same effect, stating that in his view minority workers had less opportunity to enter skilled craft jobs as "a direct result of employment discrimination over the years, the lack of opportunity on the part of [minorities] to obtain the kind of training that was necessary to achieve the skills" (A. 90). Minority workers "had not been permitted to participate in certain skilled occupations and, therefore, they couldn't be available in any quantity in the market place" (A. 93). At other plants, Kaiser had sought to hire minority craftsmen through the building trades unions that represented its craft employees, but "in the majority of situations, they were unable to because there weren't any in the building trades" because of discrimination against minorities in that industry (A. 104).

In fashioning the plan for race-conscious training programs, Kaiser recognized that unless some such steps were taken "to change the pattern, * * * there would be no change in the present effects of past discrimination, as it relates to craft occupations" (A. 91). The plan that the company and the union settled on was consistent with the basic approach em-

ployed under the Executive Order in both the Philadelphia Plan and Order No. 4. It used on-the-job training programs to overcome the effects of discrimination in craft jobs in the building industry;[47] it established an ultimate goal based on the minority representation in the local labor force;[48] and it provided for a hiring ratio of minorities and women designed to attain that goal within a reasonable period of time without foreclosing white employees from the training programs.[49]

Thus, the congressional approval, previously discussed, of similar affirmative action measures taken pursuant to the Executive Order program makes it clear that voluntary action of the kind taken in this case is consistent with, and not prohibited by, Title VII.

---

[47] See Philadelphia Plan, Memorandum Section 6(c)(3), Order Section 3(c) and (f); Order No. 4, 41 C.F.R. 60-2.11(a), 60-2.11(b)(1)(viii), 60-2.20(a)(1).

[48] See Philadelphia Plan, Memorandum Section 6(c)(2), Order Section 3(a); Order No. 4, 41 C.F.R. 60-2.11(b)(1)(iii).

[49] See Philadelphia Plan. Order Section 3(e) and (f); Order No. 4, 41 C.F.R. 60-2.12(d) and (g).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

WILLIAM C. BRYSON
Assistant to the Solicitor General

BRIAN K. LANDSBERG
ROBERT J. REINSTEIN
Attorneys

ISSIE L. JENKINS
Acting General Counsel
Equal Employment Opportunity Commission

CARIN ANN CLAUSS
Solicitor of Labor
Department of Labor

JANUARY 1979

APPENDIX A

THE PHILADELPHIA PLAN

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
Washington, D.C., June 27, 1969

MEMORANDUM

To: Heads of all agencies.

From: Arthur A. Fletcher, Assistant Secretary of Wage and Labor Standards.

Subject: Revised Philadelphia Plan for Compliance With Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

1. Purpose

The purpose of this Order is to implement the provisions of Executive Order 11246, and the rules and regulations issued pursuant thereto, requiring a program of equal employment opportunity by Federal contractors and subcontractors and Federally-assisted construction contractors and subcontractors.

2. Applicability

The requirements of this Order shall apply to all Federal and Federally-assisted construction contracts for projects the estimated total cost of which exceeds $500,000, in the Philadelphia area, including Bucks,

Chester, Delaware, Montgomery and Philadelphia counties in Pennsylvania.

3. Policy

In order to promote the full realization of equal employment opportunity on Federally-assisted projects, it is the policy of the Office of Federal Contract Compliance that no contracts or subcontracts shall be awarded for Federal and Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitation for bids, in trades utilizing the following classifications of employees:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

4. Findings

Enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades. Contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construc-

tion craft unions as their prime or sole source of their labor. Collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working in these classifications are referred to the jobs by the unions. Because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

Because of the exclusionary practices of labor organizations, there traditionally has been only a small number of Negroes employed in these seven trades. These exclusionary practices include: (1) failure to admit Negroes into membership and into apprenticeship programs. At the end of 1967, less than one-half of one percent of the membership of the unions representing employees in these seven trades were Negro, although the population in the Philadelphia area during the past several decades included substantial numbers of Negroes. As of April 1965, the Commission on Human Relations in Philadelphia found that unions in five trades (plumbers, steamfitters, electrical workers, sheet metal workers and roofers) were "discriminatory" in their admission practices. In a report by the Philadelphia Local AFL-CIO Human Relations Committee made public

in 1964, virtually no Negro apprentices were found in any of the building trades classes;[1] (2) failure of the unions to refer Negroes for employment, which has resulted in large measure from the priorities in referral granted to union members and to persons who had work experience under union contracts.

On November 30, 1967, the Philadelphia Federal Executive Board put into effect the Philadelphia Pre-Award Plan. The Federal Executive Board found that[2] the problem of compliance with the requirements of Executive Order 11246 was most apparent in Philadelphia in eight construction trades: electrical, sheetmetal, plumbing and pipefitting, steamfitting, roofing and waterproofing, structural iron work, elevator construction and operating engineers; and that local unions representing employees in these trades in the Philadelphia area had few minority group members and that few minority group persons had been accepted in apprenticeship programs. In order to assure equal employment opportunity on Federal and Federally-assisted construction in the Philadelphia area, the plan required that each apparent low bidder, to qualify for a construction contract or subcontract, must submit a written affirmative action program which would have the results of as-

[1] Marshall and Briggs, *Negro Participation in Apprenticeship Programs* (Dec. 1966), p. 91.

[2] These findings were based on a detailed examination of available facts relating to building trades unions, area construction volume and demographic data.

suring that there will be minority group representation in these trades.

Since the Philadelphia Plan was put into effect, some progress has been made. Several groups of contractors and Local 543 of the International Union of Operating Engineers have developed an area program of affirmative action which has been approved by OFCC in lieu of other compliance procedures, but subject to periodic evaluation. The original Plan was suspended because of an Opinion by the Comptroller General that it violated the principles of competitive bidding.

Equal employment opportunity in these trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.

In view of the foregoing, and in order to implement the affirmative action obligations imposed by the equal employment opportunity clause in Executive Order 11246, and in order to assure that the requirements of this Order conform to the principles of competitive bidding, as construed by the Comptroller General of the United States, the Office of

Federal Contract Compliance finds that it is necessary that this Order, requiring bidders to commit themselves to specific goals of minority manpower utilization, be issued.

5. Acceptability of affirmative action programs

A bidder's affirmative action program will be acceptable if the specific goals set by the bidder meet the definite standards determined in accordance with Section 6 below. Such goals shall be applicable to each of the designated trades to be used in the performance of the contract whether or not the work is to be subcontracted. However, participation in a multi-employer program approved by OFCC shall be acceptable in lieu of a goal for the trade involved in such training program. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract.

6. Specific goals and definite standards

a. *General.*—The OFCC Area Coordinator, in cooperation with the Federal contracting or administering agencies in the Philadelphia area, will determine the definite standards to be included in the invitation for bids or other solicitation used for every Federally-involved construction contract in the Philadelphia area, when the estimated total cost of the construction project exceeds $500,000. Such definite standards shall specify the range of minority manpower utilization expected for each of the designated trades to be used during the performance of the construction contract. To be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with his bid, set specific goals of minority manpower utilization which meet the definite standard included in the invitation or other solicitation for bids unless the bidder participates in an affirmative action program approved by OFCC.

b. *Specific Goals.*—(1) The setting of goals by contractors to provide equal employment opportunity is required by Section 60-1.40 of the Regulations of this Office (41 CFR § 60-1.40). Further, such voluntary organizations of businessmen as Plans for Progress have adopted this sound approach to equal opportunity just as they have used goals and targets for guiding their other business decisions. (See the Plans for Progress booklet Affirmative Action Guidelines on page 6.)

(2) The purpose of the contractor's commitment to specific goals is to meet the contractor's affirmative action obligation and is not intended and shall not be used to discriminate against any qualified applicant or employee.

c. *Factors Used in Determining Definite Standards.*—A determination of the definite standard of the range of minority manpower utilization shall be made for each better-paid trade to be used in the performance of the contract. In determining the range of minority manpower utilization that should

result from an effective affirmative action program, the factors to be considered will include, among others, the following:

(1) The current extent of minority group participation in the trade.

(2) The availability of minority group persons for employment in such trade.

(3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

(4) The impact of the program upon the existing labor force.

* * * * *

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY,
Washington, D.C., September 23, 1969.

ORDER

To: Heads of all agencies.

From: Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, John L. Wilks, Director, Office of Federal Contract Compliance.

Subject: Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

1. Purpose

The purpose of this Order is to implement Section 6 of the Order issued on June 27, 1969 by Assistant Secretary of Labor Arthur A. Fletcher to the Heads of Agencies outlining a "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction." Section 6 of the June 27 Order provides for the determination of definite standards in terms of ranges of minority manpower utilization. This Order also affirms and in certain respects amends the Order of June 27.

2. Background

The June 27 Order requires a bidder on Federal or Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 to submit an acceptable affirmative action program which shall include specific goals of minority manpower utilization within the ranges to be established by the Deparment of Labor, in cooperation with the Federal contracting and administering agencies in the Philadelphia Area, within the following 7 listed classifications:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

Since that time the Department has determined that minority craftsmen may be adequately represented in the classification and title "roofers and water proofers". For this reason, such classification is hereby temporarily excepted from the provisions of the "Revised Philadelphia Plan," subject to further examination of that trade.

Pursuant to a notice of hearing issued on August 16, 1969, representatives of the Department of Labor conducted a public hearing in Philadelphia on August 26, 27, and 28, 1969 for the purpose of obtaining information and data relevant to the establishment of ranges for the purposes of effectuating the above-

referred to June 27, 1969 Order. Section 6 of such Order provides that the following factors among others, will be used in establishing these ranges:

(*a*) The current extent of minority group participation in the trade.

(*b*) The availability of minority group persons for employment in such trade.

(*c*) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

(*d*) The impact of the program upon the existing labor force.

Having reviewed the record of that hearing and additional relevant data gathered and complied by the Department of Labor, the following findings and Order are made as contemplated by the Order of June 27, 1969.

3. Findings

(a) Minority Participation in the Specified Trades

The over-all construction industry in the five county Philadelphia area has a current minority representation of employees of 30%. Comparable skilled trades, excluding laborers, have a minority representation of approximately 12%. The construction trades in the Philadelphia area have grown and developed under similar conditions concerning manpower availability and under identical economic and cultural circumstances. Despite that fact, there are few minorities in the above-designated six trades.

The evidence adduced at the public hearing indicates that the minority participation in such trades is approximately 1%. In the June 27 Order, it was found that such a low rate of participation is due to the traditional exclusionary practices of these unions in admission to membership and apprenticeship programs and failure to refer minorities to jobs in these trades. The most reliable data available relates to minority participation in membership in the unions representing employees in the six trades. That data reveals the following:

(1) *Iron Workers.*—The total union membership in this craft in the Philadelphia area in 1969 is 850, 12 of whom (1.4%) are minority group representatives.

(2) *Steamfitters.*—Total union membership in the Philadelphia area in 1969 stands at 2,308, 13 of whom (.65%) are minority group representatives.

(3) *Sheetmetal Workers.*—Total union membership in the Philadelphia area in 1969 stands at 1,688, 17 of whom (1%) are minority group representatives.

(4) *Electricians.*—Total union membership in the Philadelphia area in 1969 stands at 2,274, 40 of whom (1.76%) are minority group representatives.

(5) *Elevator construction workers.*—Total union membership in the Philadelphia area in 1969 stands at 562, 3 of whom (.54%) are minority group representatives.

(6) *Plumbers & Pipefitters.*—Total union membership in the Philadelphia area in 1969 stands at 2,335, 12 of whom (.51%) are minority group representatives.

Based upon these figures it is found and determined that the present minority participation in the six named trades is far below that which should have reasonably resulted from participation in the past without regard to race, color and national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

(*b*) *Availability of Minority Group Persons for Employment*

The nonwhite unemployment rate in the Philadelphia area is approximately twice that for the labor force as a whole and the total number of nonwhite persons unemployed is approximately 21,000. There is also a substantial number of persons in the nonwhite labor force who are underemployed. Testimony adduced at the hearing indicates that there are between 1,200 and 1,400 minority craftsmen presently available for employment in the construction trades who have been trained and/or had previous work experience in the trades. In addition it was revealed at the hearing that there is a pool of 7,500 minority persons in the Laborers Union who are working side by side with journeymen in the performance of their crafts in the construction industry. Many of these

persons are working as helpers to the journeymen in the designated trades. Also, testimony at the hearings established that between 5,000 and 8,000 prospective minority craftsmen would be prepared to accept training in the construction crafts within a year's time if they would be assured that jobs were available to them upon completion of such training.

Surveys conducted by agencies of the U.S. Department of Labor have provided additional information relative to the availability of minority group persons for employment in the designated trades.

Based upon the number of minority group persons employed in the designated trades for all industries (construction and non-construction) and those minority group persons who are unemployed but qualified for employment in the designated trades, a survey by the Manpower Administration indicated that minority group persons are now in the area labor market as follows:

Identification of trades	*Number available*
Ironworkers	302
Plumbers, pipefitters and steamfitters	797
Sheetmetal workers	250
Electrical workers	745

A survey by the Office of Federal Contract Compliance indicated that the following number of minority persons are working in the designated trades and those who will be trained by 1970 by major Philadelphia recruitment and training agencies and those

working in related occupations in non-construction industries who would be qualified for employment in the designated trades with some orientation or minimal training:

Identification of trades	*Number available*
Ironworkers	75
Plumbers, pipefitters	500
Steamfitters	300
Sheetmetal workers	375
Electrical workers	525
Elevator constructors	43

Based upon this information it is found that a substantial number of minority persons are presently available for productive employment.

(c) *The Need for Training*

Testimony at the public hearing revealed that there is a need for training programs for willing minority group persons at various levels of skill. Such training must necessarily range from pre-apprenticeship training programs through programs providing incidental training for skilled craftsmen who are near the brink of full journeyman status.* As discussed above, between 5,000 and 8,000 minority group persons are in a position to be recruited for such training within a year's time.

---

* Testimony adduced at the hearings indicates that the traditional duration of training to develop competent workmen in the crafts may be longer than necessary to successfully perform substantial amounts of craft level work.

Testimony at the public hearings revealed the existence of several training programs which have operated successfully to train a number of craftsmen many of whom are now prepared to enter the trades in the construction industry. In order to further assure the availability of necessary training programs, the Manpower Administration of this Department has committed substantial funds for the development of additional apprenticeship outreach programs and journeyman training programs in the Philadelphia area. It plans to double the present apprenticeship outreach program with the Negro Union Leadership Council in Philadelphia. Presently, this program is funded for $78,000 to train seventy persons. An additional $80,000 is being set aside to expand this program. In addition, immediate exploration of the feasibility of a journeyman-training program for approximately 180 trainees will be undertaken. Both these programs will be directed specifically to the designated trades.*

(d) *The Impact of the Program Upon the Existing Labor Force*

A national survey of the Bureau of Labor Statistics indicates that the present annual attrition rate of construction trade membership due to retirement is 2.5% per year based upon a total work-

* Memorandum from Arnold R. Weber, Assistant Secretary for Manpower to Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, dated September 18, 1969.

ing life of 44 years per employee in each of the above-designated trades.

Based on national actuarial rates for the construction industry published by the National Safety Council, the average disability occurrence rate resulting from death or injury is 1% per year. A conservative estimate of the average rate at which employees leave construction crafts for all reasons other than death, disability and retirement is 4% per year.

Therefore, each construction craft should have approximately 7.5% new job openings each year without any growth in the craft. The annual growth in the number of employees in each craft designated under this "Revised Philadelphia Plan" has been and is projected to be as follows:

(1) *Iron Workers.*—The average annual growth rate since 1963 has been approximately 10%. It is projected that an average growth rate in employment will be 3.69% in the near future.*

(2) *Plumbers and Pipefitters.*—The average annal growth rate since 1963 has been approximately 7.38%. It is projected that an average annual growth rate in employment will be 2.9% in the near future.

(3) *Steamfitters.*—The average annual growth rate since 1963 has been approximately 2.63% and

* Projections of the annual growth rate in employment in the designated trades is based on a study by the Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Employment Security, entitled *1960 Census and 1970, 1975 Projected Total Employment.*

is projected to be approximately 2.5% for each of the next four years.

(4) *Sheetmetal workers.*—The average annual growth rate since 1963 has been approximately 2.06% and is projected to be approximately 2.0% for each of the next four years.

(5) *Electricians.*—The average annual growth rate since 1963 has been approximately 4.98%. It is projected that an average annual growth rate in employment will be 2.2% in the near future.

(6) *Elevator Construction Workers.*—The average annual growth rate since 1963 has been approximately 2.41% and is projected to be approximately 2.1% for each of the next four years.

Adding the rate of jobs becoming vacant to attrition to the rate of new jobs due to growth, the total rate of new jobs projected for each craft is as follows:

Identification of trade	*Annual vacancy rate (percent)*
Ironworkers	11.2
Plumbers and pipefitters	10.4
Steamfitters	10
Sheetmetal workers	9.5
Electrical workers	9.7
Elevator construction workers	9.6

Therefore, it is found and determined that a contractor could commit to minority hiring up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force.

(*e*) *Timetable*

In an effort to provide practical ranges which can be met by employers in hiring productive trained minority craftsmen, this Order should be developed to cover an extensive period of time.

The average length of Federally-involved construction projects in the Area is between 2 and 4 years. Testimony at the hearing indicated that a 4 year duration for the "Plan" is proper.

Therefore, it is found and determined that in order for this Order to effect equal employment to the fullest extent, the standards of minority manpower utilization should be determined for the next four years.

(*f*) *Conclusion of Findings*

It is found that present minority participation in the designated trades is far below that which should have reasonably resulted from participation in the past without regard for race, color, or national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

It is found that a significant number of minority group persons is presently available for employment as journeymen, apprentices, or other trainees.

It is found that there is a need for training programs for willing minority group persons at various levels of skills. There exist several training programs in the Philadelphia area which have operated successfully to train craftsmen prepared to enter the

construction industry and, in addition, the Manpower Administration of this Department has committed substantial funds for the development of other apprenticeship outreach programs and journeyman training programs in the Philadelphia area.

Finally, it is found that a contractor could commit himself to hiring minority group persons up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force in the designated trades.

Based upon these findings, a range shall be established by this Order which shall require contractors to establish employment goals between a low range-figure which could result in approximately 20% of the work force in each designated trade being minority craftsmen at the end of the fourth year covered by this Order.*

In addition, training and trainable minority persons are or shall be available in numbers sufficient to fill the number of jobs covered by these ranges, there being 1200 to 1400 minority persons who have had training and 5000 to 8000 prepared to accept training within a year.

Such minority representation can be accomplished without adversely affecting the present work force.

---

* Assuming the same proportion of minorities are employed on private construction projects as Federally-involved projects, the lower range should result in 2,000 minority craftsmen being employed in the construction industry in the Philadelphia area by the end of the fourth year.

Based upon the projected Annual Vacancy Rate, the lower range figure may be met by filling vacancies and new jobs approximately on the basis of one minority craftsman for each non-minority craftsman.*

4. Order

Therefore, after full consideration and in light of the foregoing, be it *Ordered*: That the Order of June 27, 1969 entitled "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction" is hereby implemented, affirmed, and in certain respects amended, this Order to continue a supplement thereto as required and contemplated by said Order of June 27, 1969.

Further ordered: That the following ranges are hereby established as the standards for minority manpower utilization for each of the designated trades in the Philadelphia area for the next four years:

Identification of trade	*Range of minority groups employment until December 31, 1970*
Ironworkers	5 percent to 9 percent.[1]
Plumbers and pipefitters	5 percent to 8 percent.
Steamfitters	5 percent to 8 percent.
Sheetmetal workers	4 percent to 8 percent.
Electrical workers	4 percent to 8 percent.
Elevator construction workers	4 percent to 8 percent.

[1] The percentage figures have been rounded.

---

* The one for one ratio in hiring has been judicially recognized as a reasonable, if not mandatory, requirement to remedy past exclusionary practices. *Vogler* v. *McCarty, Inc.*, 294 F. Supp. 368 (E.D. La. 1967).

Identification of trade	*Range of minority groups employment for calendar year 1971* [2]
Ironworkers	11 percent to 15 percent.
Plumbers and pipefitters	10 percent to 14 percent.
Steamfitters	11 percent to 15 percent.
Sheetmetal workers	9 percent to 13 percent.
Electrical workers	9 percent to 13 percent.
Elevator construction workers	9 percent to 13 percent.

[2] After December 31, 1970 the standards set forth herein shall be reviewed to determine whether the projections on which these ranges are based adequately reflect the construction labor market situation at that time. Reductions or other significant fluctuations in federally involved construction shall be specifically reviewed from time-to-time as to their effect upon the practicality of the standards. In no event, however, shall the standards be increased for contracts after bids have been received.

Identification of trade	*Range of minority groups employment for the calendar year 1972*
Ironworkers	16 percent to 20 percent.
Plumbers and pipefitters	15 percent to 19 percent.
Steamfitters	15 percent to 19 percent.
Sheetmetal workers	14 percent to 18 percent.
Electrical workers	14 percent to 18 percent.
Elevator construction workers	14 percent to 18 percent.

Identification of trade	*Range of minority groups employment for the calendar year 1973*
Ironworkers	22 percent to 26 percent.
Plumbers and pipefitters	20 percent to 24 percent.
Steamfitters	20 percent to 24 percent.
Sheetmetal workers	19 percent to 23 percent.
Electrical workers	19 percent to 23 percent.
Elevator construction workers	19 percent to 23 percent.

* * * * *

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AFFIRMATIVE ACTION GUIDELINES

* * * * *

1608.3 Circumstances Under Which Voluntary Affirmative Action Is Appropriate

(a) *Adverse Effect*

Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of Prior Discriminatory Practices*

Employers, labor organizations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited Labor Pool*

Because of historic restrictions by employers, labor organizations, and others, there are circumstances in

which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(i) training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(ii) extensive and focused recruiting activity;

(iii) elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 F.R. 38,290; 38,297; 38,299 (August 25, 1978));

(iv) modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

1608.4 ESTABLISHING AFFIRMATIVE ACTION PLANS

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable Self Analysis*

The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and its implementing regulations, including 41 C.F.R. Part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, state, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable Basis*

If the self analysis shows that one or more employment practices: (1) have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been

artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action.

(c) *Reasonable Action*

The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and time-tables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect of past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of Appropriate Affirmative Action*

Affirmative action plans or programs may include, but are not limited to, those described in the

Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 F.R. 38,814 (September 24, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 F.R. 38,290, 38,300, 38,308-38,309 (Aug. 25, 1978). That statement reads, in relevant part:

> When an employer has reason to believe that its selection procedures have . . . exclusionary effect . . ., it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:
>
> > The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;
> >
> > A recruitment program designed to attract qualified members of the group in question;
> >
> > A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of Reasonable Action*

In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(A) The plan should be tailored to solve the problems which were identified in the self analysis, see 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole.

The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(B) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

* * * * *

APPENDIX C

AFFIRMATIVE ACTION PROGRAMS FOR STATE AND LOCAL GOVERNMENT AGENCIES

POLICY STATEMENT

The Equal Employment Opportunity Coordinating Council was established by Act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

1. Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important, are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local government to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

2. Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking, certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic "conscious," include, but are not limited to, the following:

The establishment of a long term goal, and short range, interim goals and timetables for the specific

job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge, or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and,

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

4. The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such

plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the uneeded, nor should they require the selection of persons on the basis of race, color, sex, religion or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goals of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done, this 26th day of August 1976.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

APPENDIX D

MEMORANDUM—PERMISSIBLE GOALS AND TIMETABLES IN STATE AND LOCAL GOVERNMENT EMPLOYMENT PRACTICES

This Administration has, since September 1969, recognized that goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities through affirmative action programs. On the other hand, the concepts of quotas and preferential treatment based on race, color, national origin, religion and sex are contrary to the principles of our laws, and have been expressly rejected by this Administration.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, conferred on the Justice Department and the Equal Employment Opportunity Commission enforcement responsibilities for eliminating discriminatory employment practices based upon race, color, national origin, religion, and sex by state and local government employers as set forth in that Act. In addition, under the Intergovernmental Personnel Act and the merit standards statutes, the Civil Service Commission has an obligation to attempt to move state and local governments toward personnel practices which operate on a merit basis. The Department of Labor and other Executive Branch agencies have responsibilities in the area of equal employment opportunities as it affects state and local government

employers. This memorandum addresses the question of how the agencies in the Executive Branch (e.g., CSC, EEOC, Justice, Labor and other Federal agencies having equal employment opportunity responsibilities) should act to implement the distinction between proper goals and timetables on the one hand, and impermissible quotas and preferences on the other, with due regard for the merit selection principles which many states and local governments are obliged to follow, and which some state and local government employers do not properly follow with regard to equal employment opportunities.

All of the agencies agree that there is no conflict between a true merit selection system and equal employment opportunities laws—because each requires nondiscrimination in selection, hiring, promotion, transfer and layoff, and each requires that such decisions be based upon the person's ability and merit, not on the basis of race, color, national origin, religion or sex. The problems arise when an employer pays only lip service to the concept of merit selection, but in fact follows employment practices which discriminate on the basis of race, color, etc.

All of the agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination. All agencies recognize that where an individual person has been found to be the victim of an unlawful employment practice as defined in the Act he or she should be given "priority consideration" for the next expected vacancy, regardless of his relative "ability ranking"

at the time the new hire is made—this because absent the act of discrimination, he or she would be on the job. All agencies also recognize that it may be appropriate for a court to order an employer to make a good faith, nondiscriminatory effort to meet goals and timetables where a pattern of discriminatory employment practices has been found.

All agencies recognize the basic distinctions between permissible goals on the one hand and impermissible quotas on the other. Quota systems in the past have been used in other contexts as a quantified limitation, the purpose of which is exclusion, but this is not its sole definition. A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained, or which cannot be exceeded; the crucial consideration would be whether the mandatory numbers of persons have been hired or promoted. Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not enough qualified applicants, although he tried in good faith to obtain them through appropriate recruitment methods.

Any system which requires that considerations of relative abilities and qualifications be subordinated

to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible under the standards set forth herein.

A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection, but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction.

Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such an unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress. The terms "less

qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally well qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.

In some job classifications, in which the newly hired person learns on the job the skills required, and where there is no extensive education, experience or training required as prerequisite to successful job performance, many applicants will possess the necessary basic qualifications to perform the job. While determinations of relative ability should be made to accord with required merit principles, where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipated availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group from which to make selections; and if the employer does not meet the goal, he has the obligation to justify his failure.

Similarly, where an employer has purported to follow merit principles, but has utilized selection procedures which are in fact discriminatory and have

not been shown validly to measure or to predict job success (see, *Griggs* v. *Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424), there frequently is no valid basis presently available for ranking applicants objectively in order of the probabilities of success on the job. In such circumstances, all agencies agree that a public employer will be expected to devise or borrow a selection procedure which is as objective as possible and is likely to be proved valid and is not likely to perpetuate the effects of past discrimination; and to meet those goals which have been set on a vacancy basis. The selection procedure should be as objective and job related as possible, but until it has been shown to be valid for that specific purpose, it must be recognized that rank ordering does not necessarily indicate who will in fact do better on the job. Accordingly, if the goal is not being met because of the interim selection procedure, the procedure and other aspects of the affirmative action program may have to be revised. All agencies agree that use of such goals does not and should not require an employer to select on the basis of race, national origin, or sex a less qualified person over a person who is better qualified by objective and valid procedures. Where such procedures are not being utilized, valid selection procedures to determine who will in fact do better on the job should be established as soon as feasible in accordance with the principles set forth in paragraphs 2 and 5 below.

With the foregoing in mind, the agencies agree that the following principles should be followed:

1. Whenever it is appropriate to establish goals, the goals and timetables should take into account anticipated vacancies and the availability of skills in the market place from which employees should be drawn. In addition, where unlawful discrimination by the employer has been established, the corrective action program, including the recruiting and advertising obligations and the short range hiring goals, should also take into account the need to correct the present effects of the employer's past discriminatory practices.

2. The goals should be reached through such recruiting and advertising efforts as are necessary and appropriate, and the selection of persons only from amongst those who are qualified. A goal, unlike a quota, does not require the hiring of persons when there are no vacancies, nor does it require the hiring of a person who is less likely to do well on the job ("less qualified") over a person more likely to do well on the job ("better qualified"), under valid selection procedures. When the standards for determining qualifications are invalid and not predictive of job success, valid selection procedures should be developed as soon as feasible. Where an employer has followed exclusionary practices, however, and has made little or no progress in eliminating the effects of its past discriminatory practices, the selection standards its proposes to utilize in determining who is "qualified," or "better qualified" will be examined with care to assure that they are in fact valid

for such purposes and do not perpetuate the effects of the employer's past discrimination (i.e., which have as little discriminatory impact as possible under the circumstances) and do not raise artificial or unnecessary barriers.

3. In no event does a goal require that an employer must in all circumstances hire a specified number of persons, because such a goal would in fact be a quota. It is, however, appropriate to ask a court to impose goals and timetables, including hiring goals, on an employer who has engaged in racial or ethnic exclusion, or other unconstitutional or unlawful employment practices. The goals we seek in court, like those accepted voluntarily by employers, are subject to the limitations set forth in this memorandum.

4. As a general matter, relief should be provided to those persons who have been adversely affected as a consequence of the employer's unlawfully discriminatory practices. All agencies will continue to seek insofar as feasible to have persons who can show that they were injured by such practices restored to the position they would be in but for the unlawful conduct. In addition, all agencies will seek to have those persons who have been excluded from consideration or employment because of such discriminatory practices allowed to compete for future vacancies on the basis of qualifications and standards no more severe than those utilized by the employer in selecting from the advantaged groups, unless the increased standards are required by business necessity. Such relief will be sought to prevent the erection of un-

necessary barriers to equal employment opportunities. Such relief will not preclude a public employer from adopting merit standards; nor will it preclude such an employer who has previously used invalid selection standards or procedures from developing and using valid, job related selection standards and procedures as contemplated by paragraphs 2 and 5 of this memorandum.

5. Where an employer has utilized a selection device which is itself unlawfully discriminatory, relief should be sought to prohibit the use of that and similar selection devices (i.e., devices which measure the same kinds of things) together with the development of an appropriate affirmative action plan which may include goals and timetables in accord with the principles set forth in this paper. In addition, we will ask the courts to permit the employer to select (or develop) and validate a job related selection procedure which will facilitate selections on the basis of relative ability to do the job. The speed with which such new selection devices can and should be developed and validated depends upon the facts and circumstances of each case.

Agencies with equal employment opportunity responsibilities should take actions in accordance with the principles outlined in this memorandum in order to assure a coordinated approach within the Executive Branch to eliminate discriminatory employment practices and their consequences.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286216 306